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No. ____

In the Supreme Court of the United States

THE OSLER INSTITUTE, INC.,
Petitioner,

v.

LOIS FORDE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Before a district court enters summary judgment *sua sponte*, does Fed. R. Civ. P. 56 require that it give the parties the same level of notice and opportunity to respond that is required when an actual motion for summary judgment is filed, in order to avoid unfair surprise?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner, The Osler Institute, Inc. ("Osler"), is a non-profit corporation organized under the laws of the State of Indiana, with its principal place of business in Indiana. It has no parent corporation, and no publicly-held company owns 10% or more of its stock.

The Osler Institute, Inc. was the plaintiff in the underlying proceeding in the United States District Court for the Southern District of Indiana. Respondent Lois Forde ("Forde") was the defendant.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, The Osler Institute, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals").

OPINIONS BELOW

The opinion of the Court of Appeals (App. 3a) is reported at 333 F.3d 832 (7th Cir. 2003). The Court of Appeals addressed an appeal from an Order of the United States District Court for the Southern District of Indiana, which granted *sua sponte* summary judgment against Osler on August 21, 2002 (App. 15a). The district court's Order was not published in any official or unofficial source.

JURISDICTION

The Court of Appeals' decision was rendered on June 26, 2003. Osler filed a timely Petition for Rehearing *En Banc* on July 10, 2003. The Court of Appeals denied Osler's Petition on August 11, 2003. (App. 1a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

AUTHORITY INVOLVED

Federal Rule of Civil Procedure 56(c) provides:

> **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

A. Factual Background

Osler is a non-profit Indiana corporation that organizes and presents seminars in various medical specialties, to assist physicians in preparing for board certification examinations in those specialties. Osler presents these seminars several times a year, at various places in the United States.

Respondent Forde is a former employee of Osler's, under an Employment Agreement that she signed in June 1995. (App. 116a.) Her duties involved helping organize and administer some of Osler's seminars, including the seminar in psychiatry. Among other things, Forde frequently selected faculty members for a given seminar, and worked closely with them throughout the seminar's preparation and presentation.

In its Complaint filed in the district court (App. 103a), Osler alleged that Forde breached her duties under the Employment Agreement, and her fiduciary duties as a *de facto* member of Osler's Board of Directors, by affiliating with former Osler faculty members to present a competing board examination preparatory course in psychiatry. The Complaint further alleged that Forde improperly used Osler's confidential business information in her affiliation with the

competing course, that Forde interfered with Osler's business relationships, and that Forde defamed Osler's founder and President through remarks she made during a course that was presented in California.

B. Proceedings Below

1. The District Court Proceedings

On July 8, 2002, the district court held a final pretrial conference; trial was scheduled to begin on July 22.[1] Shortly before the pretrial conference, Forde filed a Motion for Sanctions based on discovery issues. In addition, at the conference the district judge noted that the parties had submitted trial briefs. He commented that Forde's brief was "pretty serious," and raised matters that "appear to be relatively dispositive of some issues that may or may not be presented at trial." (App. 91a.)

The district judge asked the parties' attorneys whether they were prepared to discuss the issues raised in the briefs, and Osler's trial counsel replied that he could try, but was hesitant because he had only been handed Forde's brief a few minutes before. (App. 91a.) The district judge said that instead of requiring the attorneys to argue the trial brief issues on no notice, he would postpone the trial and schedule arguments of counsel on the day trial was to have begun, July 22. Among other things, the district judge said:

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[1] As required by Rule 14(g)(ii), the petitioner notes that the jurisdiction of the lower court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of Indiana and the defendant a citizen of Washington.

> Well, it is a pretty serious trial brief. It is not your basic fundamental trial brief that you get two weeks before trial, and I would suggest that you need more than two minutes to look at this because there is an issue here on defamation that is fairly dispositive. There are issues on the interference with contractual relationships, and there are some serious matters about the validity of the employment contract signed by Miss Forde. So some of those issues could, in fact, impact the Court's jurisdiction in this case.
>
> * * *
>
> There is a possibility that rulings in this case could impact jurisdiction because there may not be that much money involved in this case, given some of the things that he has raised.
>
> * * *
>
> What I would rather do on the 22nd is hear your arguments on all these issues and then I can reset this case about thirty days later, or not, depending on what we decide.

App. 91a, 92a, 99a.

Following the pretrial conference, the court issued a written entry dated July 8, 2002, which stated, in pertinent part:

> Parties appear by counsel for final pretrial conference during which the parties discussed the issue of damages related to the plaintiff's, The Osler Institute, Inc. ("Osler"), damages for breach of the employment

> agreement. In addition, the Court discussed the lengthy trial brief filed by the defendant, Lois Forde ("Forde"), in which it is apparent that there are *several issues* that *may* be resolved before trial as a matter of law. Osler indicated that it was not prepared to argue all the issues at the pretrial conference. It is clear that these issues must be resolved *before the case is presented to a jury* and the Court will not resolve the issues of law without proper argument by the parties. . . . The Court hereby **sets a hearing**, at which the parties shall argue the issues raised by the trial briefs in this cause, and the parties shall appear with counsel . . . .

App. 87-88a (emphasis added).

The hearing was actually held on July 24. As instructed, the parties appeared with their counsel. However, the parties did not testify under oath, and no one else appeared as a witness. During the hearing, the district court asked the attorneys what their legal positions were on the various issues, and frequently asked what they anticipated the evidence would be on a given point. However, the court heard no sworn testimony. None of the depositions taken in the case were filed with the court, or even offered.

On August 21, 2002, the district court issued its ruling, which was entitled "Order on Defendant's Motion *In Limine* & on Defendant's Motion for Sanctions." The reference to a motion for sanctions was presumably to the motion that had been filed on June 28. No motion in limine had ever been filed, so the meaning of that part of the title is unknown. But the effect of the district court's Order was that it entered a *sua sponte* summary judgment in favor of Forde on all counts of Osler's Complaint. No actual motion for summary judgment

had been filed by either party, and the district judge had never invited either party to file such a motion.

2. The Court of Appeals' Decision

In a decision rendered June 26, 2003, a panel of the Court of Appeals unanimously affirmed the district court's ruling. It properly characterized the district court's Order as a *sua sponte* summary judgment, and recognized that such a procedure is "hazardous" and "warrants special caution." *Osler Inst., Inc. v. Forde*, 333 F.3d 832, 836 (7th Cir. 2003). It correctly stated that *sua sponte* summary judgment, while permissible, should only be entered if the losing party is given notice and an opportunity to respond. *Id.* In describing this legal standard, the Court of Appeals' language was consistent with other Seventh Circuit cases and with the standard this Court enunciated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). However, in applying the standard the Court of Appeals departed from the approach commonly followed both in its own Circuit and in others, in which losing parties are often given more protection from unexpected *sua sponte* summary judgment than Osler received. Osler timely filed a Petition for Rehearing *En Banc* on July 10, 2003. The Court of Appeals denied the Petition on August 11, 2003. (App. 1a.)

REASONS FOR GRANTING THE PETITION

A. The Standard for Granting *Sua Sponte* Summary Judgment Should Be Clarified.

The standard governing *sua sponte* summary judgment, as applied by federal Courts of Appeals, has its origin in a brief reference in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986): "[D]istrict courts are widely acknowledged to possess the

power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326.

This standard has not been further defined by this Court, but the way it is being applied in the federal courts strongly indicates that further definition is sorely needed. In the Seventh Circuit, for example, the standard is frequently phrased as requiring that the losing party have "notice and an opportunity to respond" if a district court is contemplating imposing summary judgment *sua sponte*. However, the vagueness and generality of this phraseology fosters inconsistent and thus unjust results. In particular, it has led, incongruously, to situations where (as here) a losing party may get *less* notice and opportunity to respond than would a party against whom a Rule 56 summary judgment motion has actually been filed.

That occurred in this case. The winning party, Forde, filed no summary judgment motion; she submitted a trial brief and had filed a motion for sanctions based on discovery issues that was directed toward one count of the Complaint. The district judge commented that he thought Forde's trial brief raised some serious issues that might be "relatively dispositive" of "some" of Osler's theories of liability. (App. 91a.) He wondered aloud whether the amount in controversy might be inadequate to sustain federal jurisdiction. He scheduled arguments of counsel, not an evidentiary hearing. At the argument, he did not ask for or receive any actual

evidence, with the possible exception of stipulated exhibits.[2] Instead, he asked counsel what their legal arguments were on various issues, and what they *anticipated the evidence would be.*

In *Celotex,* this Court carefully analyzed what Rule 56 required to support and oppose a motion for summary judgment. It pointed out more than once that the kinds of factual material that appropriately supported an actual *motion* for summary judgment were "pleadings, depositions, answers to interrogatories, . . . admissions . . . and affidavits." *Id.* at 322, 324. By contrast, in its Order entering *sua sponte* summary judgment in this case, the district court merely mentioned in a footnote that:

> To the extent that findings of fact are necessary to support the Court's rulings on matters of law contained herein, the facts recited here are the findings of the Court based on the briefs submitted by the parties, the stipulated exhibits and the presentation of the facts at the hearing on these matters.

App. 17a n.1.

Of course findings of fact are necessary. Under Rule 56, a court must find that there is no genuine issue as to any material fact before it grants a motion for summary judgment. But facts cannot be established by briefs, or by counsel's statements about what they *anticipate* the evidence will be,

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[2] It bears noting that the exhibits were stipulated for use *at trial,* where witnesses would be available to provide additional facts pertaining to those exhibits. Exhibits considered without the context a witness could provide, and not cited specifically, are not a sufficient basis for summary judgment.

which are two of the things the district court said it relied on. Moreover, the district court's Order contained no specific citation of the source of *any* of the facts it supposedly found.

An actual *motion* for summary judgment that provided only this kind of factual support would be tenuous at best. The standards should be no less precise for *sua sponte* summary judgment – if anything, those standards should be more exacting because of the potential for unfair surprise.

What the district court did in this case, and what the Court of Appeals allowed, was enter summary judgment in the entire case without providing notice to the parties that it was contemplating doing so. At most, a reasonable party or trial counsel would interpret the district court's remarks at the July 8 pretrial conference as an indication it thought the *legal issues* would be narrowed prior to trial, or more likely, that the court was beginning to have doubts about jurisdiction.[3] Even at the hearing for counsel's argument, the district court did not ask for or admit evidence. The court's statements and actions would not make a reasonable party or its attorney think the court was conducting an evidentiary hearing that would displace the actual trial.

The district court did not use the term "summary judgment." At a minimum, proper notice should require the district court to advise parties that it is contemplating entering judgment as a matter of law by specifically referring to "summary judgment." It is completely reasonable to require district courts to do so – parties do, when they file a motion under Rule 56. When the consequences in a case are so dire

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[3] The judge's comment about rescheduling the trial "or not" could easily be construed as a reference to remanding the case to state court, not completely disposing of it.

In addition, the district court did not provide Osler with the opportunity at the July 24 argument to present evidence to show that there were genuine issues of material fact. An opportunity to present issues of fact that preclude summary judgment should be a minimum procedural prerequisite for a district court to enter summary judgment *sua sponte*. The procedures under Rule 56 require no less.

This case demonstrates the perils of *sua sponte* summary judgment, and highlights the necessity for this Court to clarify the standard it created in its *Celotex* dictum. To ensure that the standard for *sua sponte* summary judgment is at least as consistent and fair as the procedures for a Rule 56 motion, this Court should explicitly require that, before a district court enters summary judgment *sua sponte*, it must:

1. Provide clear, unequivocal, written notice to the parties that it is contemplating entering summary judgment *sua sponte*, and use the words "summary judgment" in the notice.

2. Provide at least 10 days, consistent with Rule 56, for the parties to submit affidavits or other evidence pertaining to the factual and legal issues.

If the *sua sponte* summary judgment standard is not clarified in this manner, the result will be more instances where the current vague standard is applied inconsistently, and inconsistent approaches are taken among the Circuits—both as described below.

B. The Seventh Circuit Court of Appeals Itself Applies the Standard Inconsistently, Causing Unjust Results.

The Seventh Circuit Court of Appeals applied a standard that in its language is consistent with *Celotex,* discussing whether Osler had received adequate notice and an opportunity to respond. In applying this standard, however, the Court of Appeals deviated from the approach of every Seventh Circuit case cited in the appellate briefs.

In all the cases reversing *sua sponte* summary judgment, the losing party was found to have been given insufficient notice *even though it received more notice and opportunity to respond than Osler did in this case*. The result in this case cannot be reconciled with these decisions.

In *Aviles v. Cornell Forge Co.*, 183 F.3d 598 (7th Cir. 1999), for example, the defendant actually moved for summary judgment, and the plaintiff responded. In its reply brief, the defendant made an argument on a count of the plaintiff's claim that it had not raised before. The plaintiff moved to strike the new argument, but the district court granted summary judgment for the defendant on all counts of the Complaint anyway. On appeal, the Court of Appeals reversed, holding that the plaintiff had not been provided adequate notice and opportunity to respond to the new argument the defendant had raised.

In *English v. Cowell*, 10 F.3d 434 (7th Cir. 1993), both parties moved for summary judgment. The district court granted the defendant's motion before reply briefs were even due. The Court of Appeals held that this deprived the plaintiff of a fair opportunity to respond to the defendant's arguments, and reversed.

In *Simpson v. Merchants Recovery Bureau*, 171 F.3d 546 (7th Cir. 1999), one defendant said repeatedly at pretrial conferences that it intended to move for summary judgment on a vicarious liability issue. The parties discussed their legal positions on this issue. The district court, in an attempt to resolve the issue with a more streamlined process than a formal summary judgment motion would involve, instructed the parties to submit letters containing case citations only, which it would then review. The defendant included legal arguments in its letter, but the plaintiff followed the court's instructions and did not. The district court entered summary judgment for the defendant, but the Court of Appeals again reversed, holding that the plaintiff had not had a fair opportunity to respond.

In *Southern Illinois Riverboat Casino Cruises, Inc. v. Triangle Insulation and Sheet Metal Co.*, 302 F.3d 667 (7th Cir. 2002), the defendant filed a combined motion to dismiss/motion for summary judgment. The district court dismissed some counts of the plaintiff's Complaint, one without prejudice with leave to re-file it in another action. It then granted summary judgment to the defendant on a breach of warranty count, but on a ground (remedy limitation) that had not been raised or briefed by the parties. The Court of Appeals held that the district court had not given the plaintiff a fair opportunity to present evidence and respond regarding the remedy limitation issue. It found it unnecessary to reverse and remand, however, because the plaintiff had been given a full opportunity to make its argument about remedy limitation on appeal, and the Court found that the warranty's remedy limitation was valid as a matter of Illinois law. It therefore did not reverse in this instance.

In all these cases, the losing party had *more* notice than Osler did here, because in each of them a motion for

summary judgment had been filed or expressly threatened. In each case, however, the Court of Appeals held that the losing party had not been given adequate notice or sufficient opportunity to respond. That defect was cured in *Southern Illinois Riverboat* because the plaintiff had the opportunity to make its legal argument to the Court of Appeals. That did not and could not happen in this case, though, because Osler was primarily deprived of the chance to make *factual* showings, not legal arguments. It was not given an opportunity to present actual evidence before the district court, because the district court only asked trial counsel what it anticipated the evidence was going to be. It did not request or receive testimony from witnesses, nor were depositions filed. And it was not possible, of course, to try to cure this problem by submitting evidence to the Court of Appeals.

Even in those Seventh Circuit cases where *sua sponte* summary judgment was affirmed on appeal, the losing party had more notice and opportunity to respond than Osler did here, so those cases do not support affirming the Court of Appeals' decision affirming summary judgment against Osler.

In *Jones v. Union Pacific R. Co.*, 302 F.3d 735 (7th Cir. 2002); *Hunger v. Leininger*, 15 F.3d 664 (7th Cir. 1994); and *Goldstein v. Fidelity & Guaranty Ins. Underwriters*, 86 F.3d 749 (7th Cir. 1996), for example, the plaintiff actually moved for summary judgment, but the district court denied that motion and entered summary judgment *sua sponte* for the defendant. In *Jones*, the defendant filed a cross-motion for summary judgment with its response to the plaintiff's motion. Having moved for summary judgment itself, the plaintiff in these cases was certainly on notice that summary judgment for the other side was possible. In each of these cases, the plaintiff took the position with the district court that there were no genuine issues of material fact. (In *Hunger*, an

action for judicial review of an administrative decision, the Court of Appeals found that the plaintiff was essentially submitting the decision for review on the basis of the existing administrative record.)

Under these circumstances, the losing party had little reason to complain that it did not have notice, or that it did not have an opportunity to make arguments – it had taken the initiative and made its arguments first. In this case, by contrast, there were many contested factual issues that needed to be evaluated by the finder of fact. Osler therefore had not moved for summary judgment – and significantly, neither had Forde. Osler anticipated the opportunity to present its evidence at trial, but the district court's *sua sponte* summary judgment took that opportunity away.

Another Seventh Circuit case upholding *sua sponte* summary judgment, which was also cited by Forde in her appellate brief, is *Farries v. Stanadyne/Chicago Division*, 832 F.2d 374 (7th Cir. 1987). It is equally distinguishable from the facts of this case, because in *Farries* the defendant filed a Rule 12 (b)(6) motion to dismiss, which the district court converted to a motion for summary judgment because it cited facts outside the pleadings (contained in affidavits). In *Farries*, the plaintiff/losing party obviously had notice of a dispositive motion, because one was actually filed, and it had an opportunity to respond.

That contrasts sharply with the facts here. Forde did not file, or even threaten to file, a motion for summary judgment. The district court did not invite Forde to file a motion for summary judgment, although as the Court of Appeals recognized in other cases, that is an appropriate procedure. *See, e.g., Goldstein*, 86 F.3d at 751. Rather, the district court in this case observed that the parties' "trial *briefs* raise

some troublesome issues, which I would like to discuss a little bit today. . . . *[S]ome* of them appear to be *relatively* dispositive of *some* issues that may or may not be *presented at trial*. . . . So some of those issues could, in fact, *impact the Court's jurisdiction* in this case." (App. 90a, 91a, emphasis added.) The district court then scheduled argument on the trial brief issues, but did not say it would be an evidentiary hearing, did not suggest that counsel bring witnesses or documentary evidence, and in fact did not take evidence at the argument.[4] Under these circumstances, Osler did not receive the level of notice and opportunity to respond that the Court of Appeals has required in its other decisions. Indeed, it received less notice and opportunity than several losing parties who obtained reversals.

The solution to such inconsistent results is for this Court to clarify the *sua sponte* summary judgment standard as described above. If that standard were the guiding principle, such inconsistency and injustice would be minimized, if not avoided altogether.

C. Clarifying the Standard Would Also Rectify Inconsistent Approaches Among the Circuits.

The open-ended nature of this Court's standard, as articulated briefly in *Celotex*, has caused the Circuit Courts of Appeals to apply it differently. These inconsistent results from one Circuit to another argue strongly for this Court to clarify the standard.

The First Circuit, for example, requires that district courts adhere more precisely to Rule 56's requirements than does the

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[4] Neither party moved to admit the stipulated trial exhibits.

Seventh Circuit, and probably avoids unfair surprise and premature judgments as a result. One example of its approach is *Rogan v. Menino*, 175 F.3d 75 (1st Cir. 1999), in which the district court entered summary judgment *sua sponte* on several of the plaintiff's claims at the final pretrial conference. The First Circuit, in assessing the type of notice that the plaintiff had been given, acknowledged that at an earlier pretrial conference the district court had announced that it "might dismiss any or all of the defendants" at the final conference, *id.* at 79. It also noted, however, that there were no outstanding motions to dismiss or motions for summary judgment, and that the district court had not directed the parties to prepare for a hearing on dispositive motions. *Id.* The defendants came to the final pretrial conference armed with affidavits, but the district court did not give the plaintiff the ten days required by Rule 56 in which to respond to them.

The First Circuit, in finding that the plaintiff had received inadequate notice, stated that Rule 56 procedures apply equally to motions for summary judgment as to summary judgments entered *sua sponte*. *Id.* at 80. Specifically, it held that the losing party had to be informed of the grounds for summary judgment through identification of "those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (quoting *Celotex*, 477 U.S. at 323).

This approach requires more exacting adherence to Rule 56 prerequisites than the Seventh Circuit does, and it is also more faithful to this Court's directions in *Celotex*. As a result, it lessens the chances of unjust results.

Other examples of the First Circuit's approach in this area include *Leyva v. On the Beach, Inc.*, 171 F.3d 717 (1st Cir.

1999) (defendant moved for partial summary judgment on one count only; district court entered summary judgment as to all claims; First Circuit noted that district court did not invite losing plaintiffs "to assemble and proffer their best evidence," *id.* at 720; summary judgment vacated); and *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24 (1st Cir. 1996) (district court denied most of defendants' motions for summary judgment and did not grant later requests to renew them; after a series of pretrial conferences designed to narrow and frame the issues, district court entered an interlocutory judgment for defendants while giving plaintiff additional "time for filing something more," *id.* at 28, and later made judgment final; First Circuit held that plaintiff had not been given adequate opportunity to present evidence; summary judgment vacated.)

These decisions are particularly noteworthy in the context of this case, because Osler was also not given an opportunity to present evidence before the district court entered summary judgment. If Osler's appeal had been presented in the First Circuit, it appears certain that the judgment against it would have been vacated, but Osler was given short shrift under the Seventh Circuit's less defined, and less consistent, approach (*see, e.g.*, its statement that the district judge's statements "seem clear to us," 333 F.3d at 836). To avoid such inconsistent results in the future, and for the benefit of litigants and courts alike, this Court should use this case to articulate a clear, defined standard for *sua sponte* summary judgments.

Other Circuits adhere to an approach more like the First Circuit's than the Seventh Circuit's. In *First Financial Ins. v. Allstate Interior Demolition Corp.*, 193 F.3d 109 (2nd Cir. 1999), for example, the Second Circuit reversed *sua sponte* summary judgment in favor of the plaintiff insurer in a declaratory judgment action, finding that the district court

should not have converted the insurer's Rule 12(b)(6) motion into one for summary judgment without giving the defendant an opportunity to present evidence. *Id.* at 115; *see also B.F. Goodrich v. Betoski*, 99 F.3d 505, 522 (2nd Cir. 1996) (reversing summary judgment granted *sua sponte* because district court failed to give the plaintiffs "ten days' notice to show good cause why summary judgment should not be granted against them" in CERCLA litigation; district court only requested that plaintiffs list third-party claims they did not intend to pursue, and then granted summary judgment on all claims, even those pertaining to the parties that were not listed).

The Sixth Circuit uses a two-tiered standard of review for *sua sponte* summary judgments, distinguishing between substantive and procedural elements, that appears to be unique among the Circuits. *See, e.g., Employers Ins. of Wausau v. Petroleum Specialties*, 69 F.3d 98, 105 (6th Cir. 1995). This case also enunciates a higher level of scrutiny than the Seventh Circuit, however, demanding that district courts give a party "unequivocal notice of the court's intentions" before entering summary judgment *sua sponte*. *Id.* The Sixth Circuit reversed the district court's entry of *sua sponte* summary judgment in that case. Its approach, if the Seventh Circuit had followed it here, would also have mandated the reversal of the district court's judgment against Osler, because it is beyond debate that the district court's notice to Osler was far less than "unequivocal."

It is obviously desirable that the application of the Federal Rules of Civil Procedure does not vary so drastically depending on the geographic accident of what Circuit hears an appeal. This is particularly true when an entire case hangs in the balance, which often happens under Rule 56. By issuing a writ of certiorari in this case and clarifying Rule 56

standards as they apply to *sua sponte* summary judgment, this Court can bring order and consistency to the divergent and variable results that currently obtain in the various Circuits. Doing so would aid district courts and Courts of Appeals by giving them clearer standards that can be applied more uniformly and predictably. More important, it would promote justice by lessening the possibility of unfair surprise.

CONCLUSION

Osler was unfairly surprised by the district court's entry of summary judgment *sua sponte*. Osler was not provided adequate notice of the district court's intention, nor given the opportunity to present evidence showing that there were genuine issues of material fact. Instead, Osler was denied its day in court based on nothing more than counsel's arguments about what they anticipated the evidence would be.

As is clear from the split in the Circuits discussed above, litigants in federal court are subject to *sua sponte* summary judgment under inconsistent standards, many of which provide significantly less procedural protection than is required under Rule 56. The vagueness and inconsistency of those standards cause unfair surprise and unjust results.

This Court can remedy this problem by ruling that *sua sponte* summary judgment must be preceded by the same kind of clear, unequivocal notice, and the same adequate opportunity to respond and present evidence, that is required when an actual motion for summary judgment is filed. For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3441

[August 11, 2003, Decided]

THE OSLER INSTITUTE, INC.,
Plaintiff-Appellant,

v.

LOIS FORDE,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Terre Haute Division.
No. TH01-019-C-M/H. Larry J. McKinney, Chief Judge.

Before BAUER, RIPPLE, Circuit Judge,
and EVANS, *Circuit Judges*.

ORDER

On July 10, 2003, the plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote

on the petition for rehearing *en banc*. The petition for rehearing is therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3441

[June 26, 2003, Decided]

THE OSLER INSTITUTE, INC., *Plaintiff-Appellant*,	)
v.	)
LOIS FORDE, *Defendant-Appellee*.	)

Appeal from the United States District Court
for the Southern District of Indiana, Terre Haute Division.
No. TH01-019-C-M/H. Larry J. McKinney, Chief Judge.

Before BAUER, RIPPLE, Circuit Judge,
and EVANS, *Circuit Judges*.

OPINION

EVANS, *Circuit Judge*. The Osler Institute sued its former employee, Lois Forde, after she began working for a rival company. Although neither party filed any dispositive

motions, the district court snuffed out Osler's hopes of recovery before trial when it sua sponte granted judgment in Forde's favor. Osler appeals.

The Osler Institute is a test preparation company headquartered in Indiana. Osler runs 60 to 70 seminars a year to help doctors prepare for specialty medical board examinations. Dr. Joseph Selliken is Osler's founder and president, and for most of the company's history he and his wife have been the sole members of its board of directors.

In 1995 Osler hired Lois Forde--Dr. Selliken's second cousin--on a part-time basis to coordinate a few seminars a year. Forde's job involved mainly administrative tasks, many of which revolved around the guest lecturers who taught the substantive material at the seminars. These tasks included choosing the lecturers for a seminar from Osler's lists, arranging the logistics of the lecturers' participation, taking the lecturers to dinner, administering evaluations of the lecturers, and helping to determine if a lecturer would receive a bonus. In addition, Forde reported any problems at the seminar to Osler. When Forde began her job, she signed an employment agreement containing a non-compete clause.

Three years after Forde started working for Osler, Dr. Selliken offered her a position on the board of directors. Forde conditioned her acceptance on an independent audit of Osler's financial status and indemnity insurance--conditions Osler never met. Nevertheless, after Dr. Selliken's offer, Forde attended four board meetings. She was a vocal participant and even kept minutes for the meetings, referring to herself as the "secretary designate." Forde downgraded herself to "guest" at the last meeting--apparently recognizing

that her conditions to becoming an official board member were not going to come to pass. Osler never listed Forde as a director on its annual state filings.

Time passed, and at an Osler seminar in January 2000, Forde commented--in front of others--that Dr. Selliken may have taken a volunteer patient at a seminar to a motel and that his behavior was inappropriate. On April 15, 2000, Forde and Osler parted ways (it's unclear whether Forde quit or was fired, but it doesn't matter for our purposes). That same month, Dr. Peter Rosenbaum contacted Forde and invited her to work for PsyPrep, a new psychiatry board preparation company run by former Osler lecturers. Forde knew the members of PsyPrep through her work at Osler. Despite Forde's employment agreement with Osler and the clear connection between Osler and the members of PsyPrep, she accepted Dr. Rosenbaum's invitation, invested a small sum of money in the company, and began working for PsyPrep. Forde's work consisted of administrative tasks, like obtaining business licenses and a post office box for the company, and taking calls for PsyPrep on a line she installed in her home, and marketing work, such as developing a brochure for PsyPrep's first planned seminar in April 2001 and inquiring about advertising possibilities.

Dr. Selliken soon learned of Forde's work with PsyPrep, and he wasn't pleased. He couldn't find Forde's employment agreement (with the noncompete clause), so he tried to get her to sign a new one. Forde refused. Later, Dr. Selliken located Forde's 1995 employment agreement and, in January 2001, sent a copy of that agreement to her--along with a draft of the complaint in this case. Facing a possible federal lawsuit, Forde sprang into action. By the end of January, she had

resigned from PsyPrep, received her initial investment back, and turned over all of her PsyPrep materials. Without any more assistance from Forde, PsyPrep went on to offer its first board review course in April 2001, holding three or four courses that year.

Osler moved ahead with this lawsuit--Forde's resignation from PsyPrep and family relationship with Dr. Selliken notwithstanding. Osler claimed that Forde breached her employment agreement and fiduciary duties, intentionally interfered with its relationship with its lecturers, and slandered Dr. Selliken. Neither party filed any dispositive motions and the case appeared to be headed for trial--until the pretrial conference on July 8, 2002. At the pretrial conference, Chief Judge Larry J. McKinney said he was concerned about issues raised in the parties' trial briefs. Specifically, Judge McKinney pointed to problems with the validity of Forde's employment agreement, the calculation of damages, and Osler's interference with business relationships and slander claims. Based on these concerns, Judge McKinney vacated the July 22, 2002, trial setting and told the parties to prepare for oral argument on the issues in the trial briefs instead.

Oral argument was held and, about a month later, Judge McKinney issued a ruling dismissing all of Osler's claims. The breach of contract claim failed because Judge McKinney determined the underlying employment agreement was invalid. Judge McKinney did not find that Forde had any fiduciary duties to Osler, dooming the breach of fiduciary duty claim. The intentional interference with business relationships count was jettisoned due to a lack of evidence that Forde engaged in illegal conduct--an element of the

claim. Finally, Osler's last claim, slander, was dismissed as a sanction for dilatory actions during discovery.

On appeal, Osler doesn't question the dismissal of its slander claim. As far as the other claims, Osler protests that the district court didn't give sufficient notice that it was contemplating entering judgment sua sponte. Also, while Osler doesn't formally identify the merits of the district court's decision as an issue on appeal, it devotes a portion of its brief to that topic, so we'll address the merits of Judge McKinney's opinion, too. First, the procedural issue.

As a preliminary note of clarification, we are aware that the district court never explicitly said that it was entering *summary judgment* sua sponte, but that's clearly what happened. In the absence of pending dispositive motions, the district court looked to matters outside the complaint to determine that Forde was entitled to judgment as a matter of law. We find the district court's statement that it was ruling on Forde's motions in limine a little mysterious (Forde hadn't filed any motions in limine), but the solution to that puzzle doesn't impact our analysis, so we'll leave it unsolved.

With that speed bump out of the way, we can analyze whether it was cricket for the district court to enter summary judgment on its own motion. Granting summary judgment sua sponte is permissible, although it is a hazardous procedure which warrants special caution. *See Jones v. Union Pac. R.R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002) (citing *Peckmann v. Thompson*, 966 F.2d 295, 297 (7th Cir. 1992), and *Sawyer v. United States*, 831 F.2d 755, 759 (7th Cir. 1987)). When there are no issues of material fact in dispute, a district court may grant summary judgment on its own motion--as long as

the losing party is given notice and an opportunity to come forward with its evidence. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 326, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Goldstein v. Fidelity and Guar. Ins. Underwriters, Inc.,* 86 F.3d 749, 750 (7th Cir. 1996) ("The party against whom summary judgment is entered must have notice that the court is considering dropping the ax on it before it actually falls."). In short, summary judgment should not take a party by surprise. *See Choudhry v. Jenkins,* 559 F.2d 1085, 1089 (7th Cir. 1977).

Despite Osler's protests to the contrary, the district court's entry of judgment should not have caught it off guard. Judge McKinney made numerous comments alerting Osler that its claims were in peril. For example, during the pretrial conference (after Forde submitted her trial brief arguing that much of the case could be decided as a matter of law), Judge McKinney said:

> • "These trial briefs raise some troublesome issues, which I would like to discuss a little bit today" and that some of the arguments "appear to be relatively dispositive of some issues that may or may not be presented at trial."
>
> • After finding out that counsel for Osler had only received Forde's trial brief a few minutes earlier, Judge McKinney said, "Well, it is a pretty serious trial brief. . . . I would suggest that you need more than two minutes to look at this because there is an issue here on defamation that is fairly dispositive. There are issues on the interference with contractual relationships, and

there are some serious matters about the validity of the employment contract signed by Miss Forde. So some of those issues could, in fact, impact the Court's jurisdiction in this case."

- Judge McKinney ended the conference by telling the parties that he was vacating the trial date so that he could hear arguments on these issues instead and then he would "reset this case about 30 days later, *or not*, depending on what we decide." He told counsel to bring their clients to the argument.

Following the conference, Judge McKinney issued an order stating that "it is apparent that there are several issues that may be resolved before trial as a matter of law" and that "it is clear that these issues must be resolved before the case is presented to a jury." At the end of the oral argument itself, Judge McKinney concluded by saying "I'll do my best to give you a ruling on this without too much delay."

Judge McKinney's statements seem clear to us. He said, point blank, that Forde had raised issues of law that should be resolved before trial and, after deciding those questions, there might not be a trial. Osler didn't object, ask for clarification, or in any way show that it was confused about the district court's actions during either the pretrial conference or the oral argument. Based on Judge McKinney's statements and Osler's acquiescence to the proceedings, we have to ask what Osler thought the judge was doing, if not potentially disposing of the case, or at least a major slice of it, without a trial.

Osler says that it thought that the judge would address jurisdictional issues, the reasonableness of the duration and scope of the employment agreement, the appropriateness of the liquidated damages provision, and "matters specifically raised in the trial briefs. " Osler's answer essentially concedes that it knew the district court planned to resolve *some* issues of law--it just didn't think Judge McKinney would address *all* the issues of law. But Forde's trial brief raised all of the matters the district court addressed, not just those Osler notes. Why would Osler think the district court was going to address some questions of law and not others--particularly when Judge McKinney specifically mentioned that he wanted to discuss other points, like the validity of the employment agreement, at the pretrial conference? Osler clearly knew the issues that were bothering the judge. It wasn't ambushed by an argument that it couldn't possibly address. *See Aviles v. Cornell Forge Co.*, 183 F.3d 598, 604-05 (7th Cir. 1999) (court improperly granted sua sponte summary judgment on issue raised in movant's reply brief). Furthermore, it knew these issues were potentially dispositive. *See, e.g., Simpson v. Merchants Recovery Bureau, Inc.*, 171 F.3d 546, 550 (7th Cir. 1999) (sua sponte summary judgment reversed when court said party should submit a list of cases prior to filing amended complaint, with no mention of summary judgment). Judge McKinney gave Osler sufficient notice that he was considering summary judgment.

Aside from the notice issue, Osler raises two other procedural concerns about the entry of summary judgment. Osler didn't list these arguments as part of its issue on appeal but, for what it's worth, we find both without merit. First, Osler says that the district court didn't allow it sufficient time under the local rules to respond to the sua sponte summary

judgment motion. *See* S.D. Ind. L.R. 56.1(b) (nonmovant has 30 days to respond to summary judgment motion). The district court did not abuse its discretion applying the local rules, *see Borcky v. Maytag Corp.*, 248 F.3d 691, 697 (7th Cir. 2001), when Osler agreed to the timing of the date set for oral argument at the July 8 pretrial conference. Second, Osler quibbles with the district court's statement of the facts, asserting it could have marshaled more evidence to support its claims and the district court relied on unsupported statements. The first part of this argument is unsuccessful because Osler had sufficient notice that summary judgment was afoot and that it needed to defend its claims--a squandered opportunity is not grounds for reversal. *See Divane v. Krull Elec. Co.*, 194 F.3d 845, 848-49 (7th Cir. 1999). As far as the district court's reliance on unsupported statements, Osler doesn't tell us what statement the district court relied upon that was unsupported and affects the outcome of this case. To sum up, while sua sponte summary judgment is not a recommended path for a district court to take, Judge McKinney did not commit any procedural errors in this case.

Having determined that the district court's decision to enter summary judgment sua sponte was not erroneous in and of itself, we turn to the disposition of Osler's substantive claims, which we review *de novo*. *See Kaplan v. Shure Bros., Inc.*, 266 F.3d 598, 601-02 (7th Cir. 2001).

Osler contends that Forde's work with PsyPrep breached the noncompetition clause in the parties' employment agreement. Judge McKinney dismissed this claim, finding the parties' employment agreement void. Under Indiana law, which applies in this case, covenants not to compete in employment agreements are disfavored and must be

reasonably necessary to protect an employer's interests. *See Ackerman v. Kimball Int'l, Inc.*, 652 N.E.2d 507, 509-10 (Ind. 1995). A non-compete agreement is reasonably necessary if an employer shows "the former employee has gained a unique competitive advantage or ability to harm the employer." *Titus v. Rheitone, Inc.*, 758 N.E.2d 85, 92 (Ind. Ct. App. 2001). In other words, the employer must show some reason why it would be unfair to let the former employee compete with it. *See id.*

Osler asserts that it had a protectible interest in Forde's future employment because she administered lecturer evaluations, knew the criteria used on the evaluations, was responsible for reporting complaints, discussed who should receive bonuses, and had developed relationships with lecturers. In essence, Osler worries that a person in Forde's position could cultivate a relationship with its best lecturers--knowing who might be unhappy and willing to jump ship--and convince them to form a competing company. We see three problems with Osler's evidence. First, some of the things Forde learned, like the names of the lecturers, were a matter of public knowledge and not protectible confidential information. *See Titus,* 758 N.E.2d at 93 (confidential customer information protectible). Second, Forde's job primarily consisted of administrative tasks. Osler may not restrict Forde from using any general organizational or administrative skills. *See Brunner v. Hand Indus., Inc.*, 603 N.E.2d 157, 160 (Ind. Ct. App. 1992) (citing *Donahue v. Permacel Tape Corp.*, 234 Ind. 398, 127 N.E.2d 235, 240 (Ind. 1955)) (no protectible property interest in employee's general knowledge, information, or skills, even if gained in the course of her employment). Third, Forde's job with PsyPrep did not utilize any of the potentially protectible

information she might have learned. While Osler may have a protectible interest in the goodwill of its lecturers, there's no evidence that Forde misappropriated that goodwill. *See Unger v. FFW Corp.*, 771 N.E.2d 1240, 1244 (Ind. Ct. App. 2002)(protectible interest found when disgruntled former employee harmed goodwill by using employer's confidential customer list). Forde's position at PsyPrep involved only administrative and marketing tasks--there's no evidence that Forde did anything to harm the goodwill between Osler and its lecturers. Thus, Osler has failed to show that the noncompete clause was reasonably necessary, so it is void, and Osler's breach of contract claim must fail.

We can make short work of Osler's claim that Forde breached her fiduciary duties. To sustain this claim, Osler must identify the source of any fiduciary duties. Osler says Forde's fiduciary duties arose from her role as a de facto director. A de facto officer or director is someone who assumes an office or position under color of right or title and exercises the duties of the office. *See In re Bankers Trust*, 403 F.2d 16, 20 (7th Cir. 1968). As noted in reviewing the similar doctrine of de facto public officers, a de facto officer must claim her office. *See Sullivan v. City of Evansville*, 728 N.E.2d 182, 190 (Ind. Ct. App. 2000) (analyzing ability to collaterally attack decisions of de facto officers). Forde never claimed that she was a director or an officer. Although she attended four board meetings and took notes, the minutes of each meeting listed her as a "board member *designate*" (or even just "guest") and stated that she would not join the board until an independent audit was completed and she had indemnity insurance. The district court correctly found that Forde was not a de facto director. Osler doesn't argue that

there is any other source of fiduciary obligations, so its breach of fiduciary duty claim fails.

Osler's last claim is that Forde intentionally interfered with its relationship with the lecturers who formed PsyPrep. Judge McKinney dismissed this claim because Osler did not show Forde's conduct was illegal--an element that Osler now contends is not necessary (this is apparently a new belief because Osler's trial brief does mention illegality in connection with this claim). While intentional interference with *contractual* relationships does not require illegal conduct, intentional interference with *business* relationships does. *See Levee v. Beeching,* 729 N.E.2d 215, 220-23 (Ind. Ct. App. 2000). We're aware that the latest Indiana Supreme Court case mentioning intentional interference with business relationships did not list illegal conduct as an element. *Felsher v. University of Evansville,* 755 N.E.2d 589 (Ind. 2001). But *Felsher* cited *Levee*--which lists illegal conduct--in support of the elements of the claim. *See Felsher,* 755 N.E.2d at 598 n.21. We don't think this was a mere oversight on the part of the Indiana Supreme Court. Barring more specific guidance on the matter, a showing of illegal conduct, which Osler did not make, is required for intentional interference with business relationships under Indiana law.

The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TH 01-019-C-M/H

[Filed August 21, 2002]

THE OSLER INSTITUTE, INC.,	)
Plaintiff,	)
	)
vs.	)
	)
LOIS FORDE,	)
Defendant.	)
	)

ORDER ON DEFENDANT'S MOTION *IN LIMINE* & ON DEFENDANT'S MOTION FOR SANCTIONS

This cause is before the Court on defendant's, Lois Forde ("Forde"), motions in limine regarding interpretation of the employment agreement at issue in this case, any fiduciary duty arising therefrom, and any interference with business associations of the plaintiff, the Osler Institute, Inc. ("Osler"), which Forde might have committed in connection with future employment. Further, the Court will address Forde's motion for sanctions under Federal Rule of Civil Procedure 37 ("Rule 37"), related to delayed responses to

discovery requests. The parties briefed the matters raised by Forde's motions *in limine* in their trial briefs. In addition, the Court held an evidentiary hearing on Wednesday, July 24, 2002 to make further inquiry into those issues of fact and law.

Based on the parties' briefs and the information presented to the Court at the hearing, the Court finds that under the circumstances of this case the employment agreement is void because Osler has not shown it had a protectible interest in the matters of Forde's employment. Therefore, Osler's claim for breach of the employment agreement should be DISMISSED. Furthermore, the Court finds that Osler's claim that Forde breached her fiduciary duty arises from the employment agreement, which the Court has found void. Therefore, Osler's claim for breach of fiduciary duty should be DISMISSED. The Court also finds that absent a breach of fiduciary duty or other unlawful activity, Osler cannot maintain its action against Forde for intentional interference with business relationships. Therefore, Osler's claim for intentional interference with business relationships should be DISMISSED.

In addition, the Court GRANTS in part and DENIES in part Forde's motion for sanctions. In light of Osler's failure timely to answer Forde's interrogatories directed to identifying the facts supporting Osler's claim for slander, and Osler's further failure to file such answers as ordered by this Court, the Court finds that Osler's claim for slander should be DISMISSED. With regard to Forde's motion for sanctions regarding damages, the Court finds that portion of the request MOOT in light of its other rulings.

I. FACTUAL BACKGROUND AND FINDINGS OF FACT[1]

Osler is a non-profit corporation organized under the laws of the State of Indiana. Osler offers review courses in approximately seventeen specialties for doctors seeking to take Board certification exams. Apparently, Osler offers between sixty and seventy courses per year across the United States. All of Osler's courses are offered off-site and none of its lecturers are employees of the company. The lecturers are considered and treated as independent contractors.

Dr. Joseph Selliken ("Dr. Selliken"), a pathologist licensed in California, is President of Osler. During much of the history of Osler, Dr. Selliken and his wife, Sunhee Selliken ("Mrs. Selliken"), were the only board members of the company.

Defendant, Forde, is a resident of Washington. She is a second cousin of Dr. Selliken. Apparently, Forde became employed at Osler in 1995 because of this family relationship with Dr. Selliken. Forde received training in Indiana by Dr. Selliken when she started with the company. Part of her training included "putting on" a course in Indianapolis.

Forde was a part-time employee, was paid by the hour and received no other benefits from Osler. She administrated

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[1] To the extent that findings of fact are necessary to support the Court's rulings on matters of law contained herein, the facts recited here are the findings of the Court based on the briefs submitted by the parties, the stipulated exhibits and the presentation of facts at the hearing on these matters.

approximately three to five of Osler's programs per year in all parts of the United States. Forde organized courses for approximately eight out of seventeen specialties for which Osler offers courses. Eventually, however, she selected the courses she wanted to organize and focused on the psychology preparatory courses. For those courses, she frequently utilized at least one lecturer out of a set of five lecturers with whom she became familiar. Forde's annual income from Osler for the years 1997, 1998, 1999, and 2000 were: $8,739.38 in 1997; $10,026.25 in 1998; and, $6,225.00 in 2000.

Forde's responsibilities for organizing a course consisted of: selecting lecturers from a list provided by Osler; contacting the lecturers to determine their availability, setting up the schedule for lecturers, participants and patients; setting up and running the audio-visual equipment at the seminar site; answering phones during the seminar; transporting faculty and/or patients to and from the seminar site; copying materials prepared by instructors; handing out materials, including faculty evaluation sheets; collecting faculty evaluation sheets; collecting fees; making general announcements; purchasing snacks for patients; labeling and duplicating videotapes; paying patients; setting up rooms; packing and unpacking boxes of materials; and taking guest lecturers to dinner. Osler sometimes hired Kelly Services employees to perform the majority of these tasks.

Some time in late 1998, Dr. Selliken asked Forde and Dr. Darryl Heustis ("Dr. Heustis") to become members of Osler's Board of Directors. Although both Ford and Dr. Heustis apparently took part in board meetings for a time thereafter, they had predicated their acceptance of the appointments on Osler's meeting of two conditions precedent. Those conditions

were that Osler would hire an independent auditor to report on Osler's financial status and that Osler would provide director/officer liability insurance for its Board members. Osler never acted on the two conditions precedent. In addition, Osler never listed Forde or Dr. Heustis as Board members on its tax returns.

Forde participated at the four Board meetings she attended, offering her opinion on matters such as employee hiring, firing and discipline. In addition, she signed the minutes of those four meetings as secretary designate. Forde received $200.00 for each meeting she attended. Osler also assigned Forde the task of organizing its corporate retreat; the date of this retreat was not disclosed. Further, Osler asserts that Forde had access to or knew about one brief Dr. Selliken had written in support of an appeal in a law suit Osler had filed against a former employee for breach of his or her employment agreement.

In January 2000, Osler produced a course in San Diego, California, for psychiatrists. Apparently, at some point during the two-day seminary, several witnesses observed Dr. Selliken leaving the site with one of the female patients. Osler alleges that Forde made slanderous comments to Julie Selliken Carter ("Carter"), another Osler employee and relative of Dr. Selliken's, and several lecturers about Dr. Selliken's behavior with respect to this patient.

On or about April 15, 2000, Anita Loeser ("Loeser"), Vice President of Academic Affairs at Osler, told Forde that Dr. Selliken had replaced Forde with another person and that

her services would no longer be needed.[2] Forde and Osler parted ways on or about that date.

Some time in April 2000, Dr. Peter Rosenbaum ("Dr. Rosenbaum"), contacted Forde and asked her whether she would be interested in assisting he and other doctors in forming a board certification seminar company dedicated to programs for psychiatrists. These discussions became more serious in June 2000, at which time Forde apparently became an employee of the new company called PsyPrep. Forde invested $10,000.00 in the new company. Five of Osler's former guest lecturers also became associated or partners in PsyPrep. Apparently, Forde had worked with all of these doctors when she was with Osler.

During the period between June 2000 and January 2001 Forde assisted PsyPrep by obtaining a post office box, obtaining a telephone number and having a line installed for that number in her home, editing and laying out brochures, inquiring about development costs for such brochures, inquiring about deadlines for advertising in various journals, making lists of equipment needs, obtaining forms for and registering the new company with the appropriate state agencies, and doing other organizational-type tasks.

In July 2000, Forde and her family were visiting relatives in North Dakota when Dr. Selliken insisted on meeting with

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[2] Osler asserts that Loeser was no longer employed by the company when she called Forde to fire her. However, Osler made no effort to inform Forde otherwise. Therefore, the Court finds that Osler and Forde severed their employer/employee relationship on or about April 15, 2001.

Forde. At the meeting, Dr. Selliken told Forde that he needed her to execute an employment agreement because he was not sure that Forde had ever signed one when she became employed at Osler. Forde refused to sign the agreement.

On or about January 19 or 20, 2001, Forde received a proposed draft of the complaint against her in this case. Attached to the complaint was an employment agreement signed by her and dated June 21, 1995. There is no signature on behalf of Osler on the document. The complaint was filed in this Court on January 24, 2001.

Forde resigned from PsyPrep on January 22, 2001. She received her $10,000 investment back by check dated January 25, 2001, and turned over all of the information related to PsyPrep in her possession to another individual on January 29 and 30, 2001.

PsyPrep put on its first psychiatric board-prep course in April 2001 in Chicago, Illinois. Apparently, the only thing that Forde had prepared for PsyPrep's course before she left was the brochure announcing the program; the brochure had not been mailed. No contracts with hotels had been signed or participants signed up. PsyPrep produced a total of four psychiatric board-prep courses in 2001, including the one in Chicago. Osler also produced a psychiatric board-prep course in Chicago in April 2001, and three more courses in 2001.

II. DISCUSSION

In her trial brief Forde presented several issues for the Court to resolve as a matter of law based on the circumstances

presented. Those issues include: whether or not the employment agreement is valid; whether or not Forde was ever a director subject to a fiduciary duty and whether or not there is evidence to support that Forde breached that duty, and, whether or not, absent a fiduciary duty, there is evidence to support Osler's intentional interference with business relations claim. The Court will address each of the issues in turn.

A. VALIDITY OF THE EMPLOYMENT AGREEMENT

1. Lack of Mutuality

Forde argues that the employment agreement lacks mutuality because it was never signed by an Osler representative and because the agreement does not obligate Osler to do anything. The Court finds that the law of Indiana supports a finding of mutuality in this case.

In Ackerman v. Kimball International, Inc., 634 N.E.2d 778, 781 (Ind. Ct. App. 1994), *adopted in pertinent part on transfer,* 652 N.E.2d 507, 511 (Ind. 1995), and *Leatherman v. Management Advisors, Inc.,* 448 N.E.2d 1048, 1050 (Ind. 1983), the courts held that in the non-competition agreement context, a promise of employment or a promise of continued employment at a specific compensation is sufficient consideration to uphold the agreement. In this case, although the employment agreement itself does not state that in return for signing the agreement Forde would receive Osler's offer of employment at a certain salary, the fact that the date on the agreement is April 21, 1995, coupled with the fact that Forde admits that she became employed by Osler in 1995, suggests

that the document was signed as a condition of employment. Under these circumstances, the Court finds that the employment agreement is not void for lack of mutuality.

2. Protectible Interest

There are two prohibitions in the employment agreement at issue in this case. They state, in relevant part:

> 1. NONCOMPETITION: During the term of this agreement, and for a period of thirty-six (36) months from the date oftermination of the employment under this agreement, the Associate will not, within the geographic limits of the United States, own, manage, operate, join, control, or be employed by any business which competes or plans to compete with any continuing education program produced or being produced by the Corporation at the time of such termination.
>
> . . .
>
> 2. NONSOLICITATION OF CLIENTS: Associate agrees that clients of the Corporation include both students and faculty who have or will have enrolled or contracted to participate in any past or future program organized, sponsored or cosponsored by the Corporation .... During the term of this Agreement and for a period of three years immediately following the termination of employment with the Corporation, the Associate shall not in any competition with Corporation employ or retain

> or be employed or retained by any person who is employed or retained by the Corporation during the term of this agreement, nor contact, nor solicit any client of the Corporation, whom Associate or anyone employed or retained by the Corporation had contacted or solicited.

Compl. Exh. A., ¶¶ 1 & 2. Forde argues that these clauses are not enforceable because Osler cannot show it has a protectible interest with respect to the content of Forde's job. Specifically, Forde asserts that the nature of her employment with Osler did not give her access to proprietary or confidential information of Osler. She avers that she was neither a manager of the corporation nor a negotiator on behalf of the corporation in the production of any of its programs. Neither did she recruit lecturers or students or negotiate contracts with either type of "client." Forde argues that the information she knew about Osler's programs is in the public domain; therefore, it is not proprietary or confidential information. In addition, Forde asserts that the skills she utilized in performing her job were organizational in nature rather than skills learned by Forde through Osler.

Osler argues that Forde was privy to Osler's list of potential faculty, evaluations of those faculty and Osler's scheduling procedures. Osler asserts that these are protectible interests and it would be unfair to allow Forde to compete with Osler because of these interests.

In Indiana, non-compete agreements or covenants not to compete are not favored in the law. *See Titus v. Rhetone, Inc.*, 758 N.E.2d 85, 92 (Ind. Ct. App. 2001). Therefore, the Court must construe the agreement here against Osler and

enforce it only if it is reasonable. *See id.; see also Bridgestone/Firestone, Inc. v. Lockhart,* 5 F. Supp. 2d 667, 682 (S.D. Ind. 1998). The agreements "must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest." *Titus,* 758 N.E.2d at 92. Therefore, first an "employer must show some reason why it would be unfair to allow the employee to compete with the former employer." *Id.* In other words, the employee must have gained some unique competitive advantage or ability to harm the employer. *See id.* The employee must have access to "trade secrets" or "confidential information" for the employer to have a protectible interest. *See id.* A company may also protect the good will generated between its customers and its business, including the names, addresses and requirements of its customers and any "representative contact with those in the trade." *Id.*

The Court finds that Osler did not have a protectible interest in the information with which Forde had contact while performing her job. The evidence shows that Forde was not responsible for scheduling when or where the seminars would take place. Nor was Forde responsible for negotiating contracts with hotels or potential faculty members. There is no evidence that Forde designed the continuing education programs, decided or selected any content of those programs, or developed literature or promotional pieces about Osler or its programs. Forde used organizational skills to produce seminars.

Furthermore, Osler presented no evidence or argument that Forde developed on behalf of Osler a relationship with lecturers or the "best" lecturers for any given course area. To the contrary, Osler's evidence shows that Osler developed

lists of available lecturers and negotiated contracts with those lecturers. When Forde organized a program she utilized the lecturers with whom Osler had already developed relationships and contracts. Moreover, as Forde points out, the names of lecturers from prior events was a matter of public knowledge. Similarly, there is no evidence that Forde independently developed special relationships with potential students or with groups who had access to potential students. This was simply not part of her organizational responsibilities.

For these reasons, the Court finds that Osler did not have a protectible interest with respect to Forde's employment. Therefore, the employment agreement is void with respect to Forde. Osler's claim that Forde breached the employment agreement should be DISMISSED.

B. BREACH OF FIDUCIARY DUTY

With respect to Osler's claim that Forde breached her fiduciary duty, Forde asserts that she was never a director of Osler, therefore, there was no relationship that would give rise to a fiduciary obligation. Specifically, Forde alleges that she went to four Board of Directors meetings in "an advisory role" until Osler complied with certain conditions precedent to her agreement to serve as a Board member. Osler never complied with the conditions precedent; therefore, Forde argues, she was never a Board member.

In addition, Forde argues that shewas not a "de facto" director because she never consented to assume the duties of a director. In other words, she never "assumed the position under color of right or title" nor did she "exercise the duties

of the office." Def.'s Trial Br. at 31 (citing *In the Matter of Banker's Trust,* 403 F.2d 16, 18 (7th Cir. 1968)).

Finally, Forde argues that Osler never answered her requests for admission, which were served upon Osler on February 27, 2002. Therefore, pursuant to Federal Rule of Civil Procedure 36(a), the Court should deem the statements admitted. Request number 7 reads: "That Lois Forde was never a Director of The Osler Institute, Inc."

For these reasons, Forde asserts that Osler cannot prove that she owed it a fiduciary duty. Therefore, its claim that Forde breached her fiduciary duty should be dismissed.

Osler counters that Forde was allowed to attend four Board meetings and was privy to confidential discussions regarding other employees with the company. Therefore, she was at least a de facto director. Osler asserts that Forde "may not now claim that she is not liable to the plaintiff for the misuse of such confidential information because the conditions for her formal acceptance of the office of director did not occur." Further, at the hearing on these matters, Osler admitted that because Forde was no longer employed by Osler when the alleged breach of fiduciary duty occurred, the duty arises from the employment contract.

The Court finds that Osler's claim for breach of fiduciary duty should be dismissed. The Court has found that the employment agreement signed by Forde is void as to her. Osler's claim that Forde breached her fiduciary duty arises from activity Forde undertook after Osler fired her. Further, Osler admitted during the hearing that her continuing fiduciary obligation to Osler would arise from the

employment agreement. Because the Court has determine that the employment agreement is void as to Forde, Osler's claim that Forde breached her fiduciary duty has no foundation.

Furthermore, the Court finds that Osler was derelict in its duties under the Federal Rules of Civil Procedure in answering Forde's requests for admissions. Pursuant to Rule 36(a), the Court finds that Forde's requests for admissions should be deemed admitted. Therefore, Osler has admitted that Forde was not a director of Osler, which, absent the employment agreement, is the only basis upon which Osler may bring a breach of fiduciary duty claim.

With respect to Osler's argument that Forde acted as a de facto director and could be liable as a fiduciary on that basis, the Court finds that Forde was not a de facto director. In Indiana, one becomes a de facto director when the individual "claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case maybe." *McGuirk v. Indiana,* 169 N.E. 521, 523 (Ind. 1930). The facts brought before the Court indicate that Forde attended four Board meetings and participated in those meetings. However, there is no indication that she ever claimed possession of the office or claimed to be such an officer of Osler as required under Indiana law. Apparently, Osler never thought Forde was a director either because it never reported her as a director on its tax returns.

Moreover, it is unclear to the Court, even after the hearing, what fiduciary duty Forde breached while she was an alleged director. At the hearing Osler agreed that Forde was no longer either a director or an employee when she became

involved with PsyPrep. Absent those connections, or a valid employment agreement, there was no fiduciary obligation for Forde to breach.

For the foregoing reasons, the Court finds that Osler's claim that Forde breached her fiduciary duty should be DISMISSED.

C. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

In Indiana, to succeed on a claim of tortious interference with business relationships, a plaintiff must prove by a preponderance of the evidence the following elements:

> "(1) the existence of a valid relationship; (2) the defendant's knowledge of a the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from defendant's wrongful interference with the relationship."

Felsher v. Univ. of Evansville, 755 N.E.2d 589, 598 n.21 (Ind. 2001) (quoting *Levee v. Beeching*, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000)). In addition, illegal conduct is an essential element of tortious interference with a business relationship. *See Levee,* 729 N.E.2d at 222 (citing *Bradley v. Hall,* 720 N.E.2d 747, 751 (Ind. Ct. App. 1999)).

Forde argues that because she did not owe Osler a fiduciary duty or breach any fiduciary duty owed, she cannot be held liable for this tort because there is no other allegation

of illegal conduct. Further, Forde argues that Osler did not have ongoing contracts with its lecturers; each was treated as an independent contractor. In addition, Forde contends that she did not make overtures to the lecturers, they contacted her. Therefore, Forde asserts that she did not interfere with any relationships held by Osler.

Osler asserts that Forde did owe it a fiduciary duty. In addition, because she created special relationships with several of Osler's lecturers during her employment and then joined them to create a competing company, she should be enjoined from ever doing business with those lecturers in any capacity.

The Court finds that Osler cannot show any illegal conduct on the part of Forde that supports its claim for tortious interference with business relationships. As previously found by the Court, Osler cannot support its claim that Forde breached a fiduciary duty owed it. Absent that element, Osler's claim for tortious interference with business relationships fails.

For the foregoing reasons, Osler's claim that Forde tortiously interfered with its business relationships and should be enjoined should be DISMISSED.

D. SLANDER

Forde has moved for the sanction of dismissal of Osler's slander claim because Osler failed timely to answer interrogatories going to the details of Osler's allegations of slander and because Osler failed to comply with this Court's order to answer the interrogatories at a future date.

Specifically, Forde states that she served interrogatories on Osler on February 27, 2002. Osler's responses were due on April 1, 2002; Osler did not respond. Throughout April and May, Forde, by counsel, made repeated requests of Osler's counsel to respond to the interrogatory requests. Forde's attempts to get Osler to comply were not successful.

At a pre-trial conference in this matter on May 30, 2002, before Magistrate Judge William G. Hussman, Jr., Forde, by counsel, brought this problem to Judge Hussman's attention. During the pre-trial conference Judge Hussman verbally ordered Osler to answer both Forde's requests for production and her interrogatories on or before June 7, 2002. Thereafter, Judge Hussman issued a written order to the same effect. Osler timely responded to Forde's requests for production; however, Osler did not provide answers to Forde's interrogatories. Osler finally served answers to the interrogatories on June 28, 2002.

The specific interrogatories at issue state:

1. In Plaintiff's Complaint, Count V, Plaintiff has alleged that Defendant, Lois Forde, has slandered The Osler Institute, Inc. In connection with said Count V, please state:

   A. Provide the substance of the slanderous comments upon which Plaintiff intends to rely.

ANSWER: The substance of her comments was that Dr. Joseph H. Selliken, President and CEO of The Osler Institute, Inc. has been gone with a patient for

several hours and may have taken the female psychiatric patient, Tracey, to a motel. Further, she referred to Dr. Selliken's "other side" and detailed how she had been embarrassed by his behavior at another Osler course. She went on to say how Dr. Selliken's irresponsible behavior may result in the Institute being brought down by a "fat lawsuit." She also opined that such a lawsuit could impose personal liability upon the faculty members. Also, Defendant expressed that it must have been Dr. Selliken who was responsible for some stolen money (referring to employees' money that had disappeared).

B. To whom did Defendant, Lois Forde, allegedly publish or relate the alleged slander?

ANSWER: Julie Carter, certain staff members of The Osler Institute and doctors working at the seminar in San Diego.

C. When did Defendant, Lois Forde, allegedly publish or relate each alleged slander?

ANSWER: January, 2000, and December 2001.

2. Provide the name, address and telephone number of each person whom the Plaintiff intends to call as a witness in support of the allegations of [slander].

ANSWER: Dr. Mark McClung, his address and telephone number are listed in the deposition and he is on Defendant's Witness List and Julie

Carter, 2883 S.E. Woodward, Portland, OR 97202.

Def.'s Mot. for Sanctions, Exh. A, Ques. 1 & 2. In addition to its late answers to interrogatories, Osler filed the affidavit of Julie Carter on July 18, 2002, which alleges the details behind Osler's answers to these interrogatories. Forde moved to strike the affidavit at the hearing on these matters.

Federal Rule of Civil Procedure 37(b) states, in pertinent part:

If a party... fails to obey an order to provide or permit discovery,...the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(13) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence; [or]

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party ...."

Fed. R. Cir. P. 37(b). Forde asserts that as a sanction, the Court should either enter a default judgment in favor of Forde for Osler's repeated failure to respond to counsel's request for answers to the interrogatories and its failure to comply with Judge Hussman's order. In the alternative, Forde requests that the Court issue an order that would prohibit Osler from producing evidence which establish the elements of slander that relate to the interrogatories in question, including the precise utterance attributed to Forde.

Generally, Rule 37 sanctions are appropriate where a party displays wilfulness, bad faith or fault. *Langley v. Union Elec. Co.,* 107 F.3d 510, 514 (7th Cir. 1997) (citing *Phillips Medical Sys. Int'l, B. V. v. Bruetman,* 982 F.2d 211, 214 (7th Cir. 1992)). A finding of wilfulness and bad faith may be predicated upon, a pattern of contumacious conduct or dilatory tactics or the failure of less drastic sanctions." *Crown Life Ins. Co. v. Craig,* 995 F.2d 1376, 1383 (7th Cir. 1993). However, fault is "'unconcerned with the non-complying party's subjective motivation, but rather only describe[s] the reasonableness of the conduct----or lack thereof which eventually culminated in the violation.'" *Langley,* 107 F.3d at 514 *(quoting Marrocco v. Gen Motors Corp.,* 966 F.2d 220, 224 (7th Cir. 1992)). Poor judgment on the part of the non-complying party has been held sufficient to warrant sanctions under Rule 37. *See id.* (citing *Marrocco,* 966 F.2d at 224). Any sanction imposed pursuant to Rule 37 "'must be proportionate to the circumstances surrounding the failure to comply with discovery.'" *Id.* (quoting *Crown Life Ins.,* 995 F.2d at 1382; citing *Newman v. Metro. Pier & Expo. Auth.,* 962 F.2d 589, 591 (7th Cir. 1992)).

The Court finds that sanctions are appropriate in this case. Osler provides no reason for its delay in answering the interrogatories propounded by Forde. It also provides no reason for its failure to comply with Judge Husssman's order that Osler answer the interrogatories on or before June 7, 2002. The trial in this matter was set for July 22, 2002. By the time Osler answered the interrogatories on June 28, 2002, trial on the merits was a mere three weeks away.[3] Without information upon which to make further inquiry, Forde was prejudiced by Osler's failure to provide the details about its slander claim. This is further evidenced by Forde's counsel's recitation of the alleged utterances at the final pre-trial conference held with the Court on July DATE, 2002. Forde's counsel thought that Osler's second allegation of slander regarding Dr. S elliken's alleged propensity to take employees money occurred during settlement discussions, which, apparently, is not the case. Furthermore, given the simplicity of the responses given to the interrogatories in question, the Court finds no justification for Osler's failure to provide answers in a timely manner or to comply with Judge Hussman's order to provide answers on or before June 7, 2002. Under the circumstances, Osler's actions were at best dilatory, if not contumacious. Therefore, the Court finds that the appropriate sanction is that default judgment in favor of Forde should be entered on Osler's slander claim.

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[3] Although the Court determined at the final pre-trial conference that this case was not ready for trial and decided to hold a hearing on that date instead, Osler should not benefit from its failure to comply with the Rules of discovery or its failure to comply with Judge Hussman's order.

For the foregoing reasons, Forde's motion for sanctions against Osler on its slander claim should be GRANTED.

E. OTHER SANCTIONS

Because of the Court's prior rulings in this Order, the Court finds Forde' s remaining issues in her motion for sanctions MOOT.

III. CONCLUSION

For the foregoing reasons, the Court finds that under the circumstances of this case the employment agreement is void because Osler has not shown it had a protectible interest in the matters of Forde's employment. Therefore, the defendant's motion *in limine* that the Court declare the employment agreement void is GRANTED and Osler's claim for breach of the employment agreement is DISMISSED with prejudice. Furthermore, the Court finds that Osler's claim that Forde breached her fiduciary duty arises from the employment agreement, which the Court has found void. Therefore, the defendant's motion *in limine* that the Court dismiss Osler's claim for breach of fiduciary duty is GRANTED; that claim is DISMISSED with prejudice. The Court also finds that absent a breach of fiduciary duty or other unlawful activity, Osler cannot maintain its action against Forde for intentional interference with business relationships. Therefore, the defendant's motion *in limine* that the Court dismiss Osler's claim for intentional interference with business relationships is GRANTED; that claim is DISMISSED with prejudice.

In addition, the Court GRANTS in part and DENIES in part Forde's motion for sanctions. In light of Osler's failure timely to answer Forde's interrogatories directed to identifying the facts supporting Osler's claim for slander, and Osler's further failure to file such answers as ordered by this Court, the Court finds that the defendant's motion for sanctions is GRANTED; as a sanction, Osler's claim for slander is DISMISSED with prejudice. With regard to Forde's motion for sanctions regarding damages, the Court finds that portion of the motion DENIED as MOOT in light of its other rulings.

IT IS SO ORDERED this 19th day of August, 2002.

/s/_____
Larry J. McKinney, Chief Judge
United States District Court
Southern District of Indiana

Distributed to:

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TH 01-019-C-M/H

[Filed August 21, 2002]

THE OSLER INSTITUTE, INC.,	)
Plaintiff,	)
	)
vs.	)
	)
LOIS FORDE,	)
Defendant.	)
	)

ENTRY OF JUDGMENT

By order issued August 19, 2002, this Court dismissed with prejudice the claims brought by the plaintiff, The Osler Institute, Inc., and against the defendant, Lois Forde. A final judgment is entered accordingly. Plaintiff shall take nothing by way of its complaint.

DATED this 19th day of August, 2002.

/s/_____
Laura A. Briggs, Clerk
United States District Court
Southern District of Indiana

/s/_____
By: Karen J. McCord
Deputy Clerk

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Cause No. TH 01-019-C-M/H
Indianapolis, Indiana
July 24, 2002
10:00 a.m.

[Filed September 4, 2002]

THE OSLER INSTITUTE, INC.,)
Plaintiff,)
)
vs.)
)
LOIS FORDE,)
Defendant.)
)

Before the
HONORABLE LARRY J. MCKINNEY, CHIEF JUDGE

OFFICIAL REPORTER'S TRANSCRIPT OF HEARING

APPEARANCES:

Transcript Hearing, dated July 24, 2002

For the Plaintiff:

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For the Defendant:

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Court Reporter:

Kathleen Andrews, RPR

PROCEEDINGS TAKEN BY MACHINE SHORTHAND

TRANSCRIPT PRODUCED BY
COMPUTER-ASSISTED TRANSCRIPTION

[p.2]

(Call to order of the Court, 10:00 a.m.)

THE COURT: Good morning.

COUNSEL: Good morning, Your Honor.

THE COURT: This is Osler v. Forde today. I set a little argument on some of these pending matters that I thought might be best to deal with prior to trial. I want to raise a

couple of issues with you and give you an opportunity to tell me what your position is.

One of the issues in this case is the noncompete clause in the employment agreement, and I'd like to have a little argument about that. I'd like to hear not so much what the law is but what the facts are that you intend to show surrounding this employment agreement. So, Mr. Trueblood, if you would step up here to the lecturn, please.

Maybe I ought to do it the other way around. Let me talk to defense. It's his motion. I know you are all ready, so...

MR. MODESITT: You don't want to hear the law, just the facts.

THE COURT: Yes. I know what the law is in this area. This is not the first noncompete clause I've ever heard. I know that they are disfavored, and I know that we interpret these clauses narrowly, and I know that the clause has to be reasonable, and I know all those things.

What I want to know is, what is it about this particular [p.3] clause and what this defendant did or didn't do that would make this clause unreasonable.

For example, the clause itself says 36 months. Now, 36 months is a little longer than most clauses, and you have a problem with the 36 months, right?

MR. MODESITT: Well, let's put it this way: It's not the most unreasonable clause I've read. It's not the most reasonable clause I've read. I don't deny that the court

systems have upheld a clause of 36 months if the covenant is otherwise reasonable.

THE COURT: Okay. Now, the next clause in the noncompete clause is within the geographical limits of the United States, which is as a general rule fairly broad. What I'm interested in specifically is what are the facts in this case in terms of what your client did while she was working with the plaintiff.

I'd like the record to reflect that both sides agree what she did for the plaintiff while she was there. That's a valid statement, isn't it? Both of you agree what she did while she was there?

MR. MODESITT: I haven't heard any disagreement.

THE COURT: Give me a quick synopsis for the record of her function.

MR. MODESITT: For the record, Your Honor --

THE COURT: And the length of time that it occurred [p.4] and the places.

MR. MODESITT: Okay. Lois Forde first began working approximately 1995 as a part-time employee of Osler Institute. She worked predominantly from her home in Arlington, Washington. She did not qualify for any fringe benefits. She was simply a part-time employee, payable by the hour.

She began her employment at $7 an hour and worked her way up I believe to $10 an hour during the year of her

termination. The most she ever made was right at $10,000 per year in any given year, and that was the year prior to her severance with Osler.

While she was there, she worked on various psychiatry programs. She may have worked one or two other programs, other disciplines. Predominantly, I believe, though, psychiatry, wherein she would work with the invited lecturers to schedule rooms, patient rooms, make sure audio/visual equipment was there, assist in getting patients to be at the, for example, the psychiatry places, make copies, collect money, sell tapes. I'm sure I've left a few things out.

THE COURT: How many times did she do that?

MR. MODESITT: An average of maybe four or five a year.

Is that correct? (Addressing Ms. Forde) Three?

THE COURT: Over the course of how many years?

[p.5]

MR. MODESITT: An average of three over the course of the years since 1975 -- '95; which Osler puts on between 60 and 70 courses per year, and she worked approximately three of those each year part-time.

THE COURT: Did she ever work anywhere other than from her Washington home?

MR. MODESITT: Only at the seminars themselves, wherever they may be. There may be one in San Diego, one in Washington, and various other states and cities.

THE COURT: So she has worked in various states?

MR. MODESITT: Yes, that's correct, Your Honor.

THE COURT: When she is on the scene, what does she do?

MR. MODESITT: Helps organize people, makes sure people get to where they are supposed to be.

THE COURT: All right. It is still your view that within the geographic limits of the United States is too general?

MR. MODESITT: Yes, I do, Your Honor.

THE COURT: Let me hear your argument on that based on the facts.

MR. MODESITT: Okay. Based upon the facts, Your Honor, the plaintiff is an organization which puts on seminars preparatory to candidates taking the board certifications for about 17 different medical specialties.

[p.6]

There is nothing unique about seminars or about board preparation, whether it be medical boards or law review exams.

What she did is not unique. She used her organizational skills. The fact that Osler is an Indiana not-for-profit corporation based in Terre Haute, Indiana, and the fact that it held seminars in other states in which it was not qualified to do business as a foreign not-for-profit company should not assist in the expansion to the geographical limits of the continental United States. The fact that one company simply holds meetings across the country should not enlarge that base.

The candidates who appear at these seminars are not unique, either. They are simply people who have graduated from medical school, have finished their residency and their internships, and are either practicing, many of them are practicing and are preparing to take board examinations. There simply is nothing unique to the pool of candidates, and there is nothing unique about the work that Lois Forde did other than utilizing her own individual organizational skills. And I don't think that the broadening to the United States under Indiana law is permissible.

THE COURT: Okay. So let's go to the next issue. What is it that she does currently that has caused this lawsuit to be filed against her?

[p.7]

MR. MODESITT: Currently she teaches music part time in her home in Arlington, Washington.

THE COURT: That's all she is doing?

MR. MODESITT: That is correct, sir.

THE COURT: What is it that the plaintiff is complaining about that she did that violated the noncompete clause?

MR. MODESITT: The plaintiff is complaining that during the late summer of year 2000 she began communications with four other former guest lecturers of Osler, and that in December of 2000 she became a part and parcel or a co-owner, so to speak, co-interest holder in an LLC called PsyPrep, whose sole function was to put on a limited number of psychology -- I'm sorry, psychiatry seminars to prepare psychiatry doctors, doctors of psychiatry to take the board exams in psychiatry. And she became associated with that for a very short period of time.

The corporation or the limited liability company was formed in December of 2000, at which time she was unaware that she had signed a noncompete to begin with. She had inquired and none was presented. In fact, one was presented in blank for her to sign in July of 2000, which further justified her belief that she had not signed one.

However, on or about the 19th or 20th of January 2001, attached to a draft complaint sent to her by either [p.8] Dr. Selliken or his attorney, a copy of which was then transmitted to me, there was an employment agreement attached as Exhibit A to the complaint that bore her signature. Even though the question of validity and enforceability were very much at issue, Lois Forde promptly and immediately ceased all activity with PsyPrep.

She was refunded her capital contribution of $2,000. She terminated her Services with them, did not participate in any way with PsyPrep, and immediately turned over whatever she

had to a gentleman whose name was Sam Mobley, who came out to Washington to pick up that information on the 29th and 30th of January, 2001.

THE COURT: What is it that she did for PsyPrep between December of 2000 and January, 2001?

MR. MODESITT: Well, immediately prior to December she had gotten off of the internet a form of articles of an LLC and had had them filled out and properly executed and filed I believe with the Secretary of State of Washington. And Dr. Mark McClung is, I think they designate him as a CEO, but under Indiana law he would be the managing member of that entity. But in between December and January she virtually did very little, if anything.

There was discussions at that time to put together a seminar to be held in April, 2001, and virtually nothing had really been done to secure the performance or the ability to [p.9] have that seminar. No hotels had been contacted. No contracts had been signed. The guest lecturers or the people who would run it were not to be recruited elsewhere. They were in fact the five doctors.

There were originally four, and the fifth one joined in December, who were all psychiatrists and who had all taught these types of seminars before. They had all taught at Osler, but also several of them had taught at similar other types of seminars. And all but one or two are on faculty at the places, such as two of them, Dr. Scurria, I believe, and Rosenbaum are at Stanford.

DEFENDANT FORDE: Dr. Belanoff.

MR. MODESITT: And one of the physicians, well, they are all, most of them are attached and teaching faculty at institutes of higher medical education. Many of them have private practices in addition to that, and then they also provide services as guest lecturers. And they didn't just do it for Osler.

None of these individuals, I might add, were ever subject to any contractual relationship. Not a single one of them were ever asked to sign a noncompete agreement.

THE COURT: So there was no seminar that was put on while she was working for PsyPrep?

MR. MODESITT: That's correct. That's correct. From a factual analysis, Your Honor, going down to the [p.10] next sentence in paragraph one of the noncompetition, the prohibition of competition has a limiting factor. And under the law you can't simply blue line or change it if it changes the meaning of it at all. The prohibition is to compete with an educational, continuing education program produced or being planned by Osler at the time of the termination.

Her termination was in April, 2000. There was no program which she undertook to compete with that was either being produced or being planned at that time.

The plaintiff alleges and in their statements of damages suggest that the liquidated damage clause extends all the way to 2003 for programs that neither PsyPrep were planning nor Osler were planning, and that clearly isn't what the document reads.

THE COURT: Okay. So did she do -- in that period of time was there any planning being done for a program?

MR. MODESITT: Only that they were going to have one. They didn't know what city, and they didn't exactly know –

THE COURT: So it wasn't announced?

MR. MODESITT: I believe that there was one announced for April.

DEFENDANT FORDE: In Chicago.

MR. MODESITT: In Chicago. But there was no hotel planning nor no other arrangements. No patients had been [p. 11] recruited, no -- when I say recruited patients, meaning people that the prospective physicians would interview in a psychiatric surrounding.

THE COURT: So when you say announced, to whom was it announced?

MR. MODESITT: A flier.

THE COURT: And the flier would go to?

MR. MODESITT: Do you know?

DEFENDANT FORDE: The flier was printed, but I didn't send it.

MR. MODESITT: She had left already. All she had done, she knew it was going to be in Chicago. She knew it was

going to be in April. And they had printed a flier, and that's the extent of it.

THE COURT: Okay.

MR. MODESITT: It hadn't been mailed. It hadn't been anything else.

THE COURT: All right. And let me hear what you have to say about this, anything further that you might have to say about this liquidated damages clause.

MR. MODESITT: Well, the liquidated damage clause, Your Honor, I think, without going into the law of what liquidated damages are, we clearly believe it's a penalty. We believe that the law of Indiana overrides the language of this clause, and in the case of Turbine v. Thompson, both of [p.12] which Mr. Trueblood was a party to as was a member of my law firm, is the prevailing case in the state of Indiana. And basically what Turbine says is that damages aren't liquidated damages in the noncompete. They are the net loss of profit to the entity. And if there are no net losses of profit, then there are no damages.

The liquidated damage here, however -- let's just assume for the moment that the Court were to believe that it should be imposed -- it would be zero because at the time of any alleged violation, going back to paragraph one, in April of 2000 there was no competing program being planned for April of 2001. So it's disqualified by the very language therein stated; and, therefore, there couldn't be any three days or one days or two days to which the $10,000 per day of competing program could be applied. It's not possible.

And as we have pointed out in our briefs, it isn't what Osler may have sustained to a 1/17 aspect of the company as to what it might have cost Osler to immediately slot, which was unplanned, a program in Chicago to oppose the PsyPrep program of April, 2001. And the reason for that is that it wasn't being planned at that time.

In addition to which, even if it cost more to do that, under the damages of Indiana, it's not the damage to a psychiatry program. It's the damages to Osler as a whole.

And Osler, the year before Lois left, had a net profit of [p.13] roughly $700,000 and change. The year after she left, in which these alleged competing programs occurred, Osler had a net profit of $1,800,000 and change; therefore, under the dictates of the case law of Indiana, no damages. No damages equate no recovery.

THE COURT: Thank you. That's all I wanted to discuss at this moment. We'll discuss some other issues here, but I wanted to look at that first.

Mr. Trueblood?

MR. TRUEBLOOD: Thank you, Judge.

Mr. Modesitt, Judge McKinney, I can see there is a wide variance in what the parties understand the facts to be. Preliminarily, may I say to you that Dr. Selliken, a pathologist who is licensed in the state of California, and who began these medical programs here in Indiana in 1984, is a second cousin to Lois Forde.

Lois Forde was employed by Osler primarily based upon that relationship. A job was created for her, and she does exactly what Osler does. She sets up, organizes, and puts on medical seminars for Osler.

She quickly got to the point where she, and she alone, was the Osler person on course. And in the last year and a half she appeared at courses in Boston in 1999. She appeared in courses -- I say appeared. She was the main person at courses in Philadelphia, in Atlanta, near Orlando, Florida. [p.14] She has also put on, been at courses in Houston, California, Washington, and I'm Confident others.

Now, it's been suggested to you, and I say this preliminarily, but it's been suggested to you that she is primarily involved in psychiatry. In her deposition she admits to being involved in running the courses in eight of the seventeen Osler disciplines.

While she would run a course, she was entrusted with thousands of dollars. At the end of each course, she gave a recapitulation.

This is a niche business, and it is conducted throughout the United States. In fact, she traveled widely while working for Osler, and it's not a situation where she sat at home in Washington and did these things.

When this was first discussed, she came to Terre Haute for a week and received training from Dr. Selliken at the Terre Haute facility. She put on a course here in Indianapolis. She was the main person on site. And I thought I should say

those things preliminarily, Judge, because they were some things you were asking counsel.

THE COURT: Right. That's exactly what I want to know. When you say put on a course, what do you mean specifically?

MR. TRUEBLOOD: Well, I mean by that, what did she not do? She did not negotiate the hotel contract. But I [p.15] mean she did select faculty from the Osler faculty. She did pass out to each course participant faculty evaluation forms. She did take the faculty to dinner. If there were mock oral examinations, she arranged for the patients to be transported to the scene, and got them home, fed people, scheduled. She did exactly what Osler does.

THE COURT: When you say selected the faculty, that means there is a list of potential faculty?

MR. TRUEBLOOD: Yes, Your Honor.

THE COURT: And so she would call those, that selected list?

MR. TRUEBLOOD: Yes, Your Honor.

THE COURT: And tell them that there was going to be a program at such and such a place?

MR. TRUEBLOOD: Yes, Your Honor. when she did psychiatry -- in her deposition, at page 50, line 9, I said:

"All of the five psychiatrists we've been discussing, every time you participated in an Osler psychiatry course, was one or more of those five psychiatrists present and participating as a faculty member?"

She answered: "Every time?"

I reasked:

"Each and every time a psychiatry course was put on by Osler and you were involved in the program, was at least one of those five present and participating as a faculty member?

Her answer: "I believe so."

[p.16]

THE COURT: Okay. Now, I'd like to focus a little bit on the issue raised by the defense that there isn't a noncompete problem in this case because the announcement of a seminar in Chicago was not in competition with any of the Osler seminars; and that according to the clause itself, in order for the clause to be implicated, she would have had to have been in competition with a program.

MR. TRUEBLOOD: Yes, Judge, I heard that.

THE COURT: Okay. What is your response?

MR. TRUEBLOOD: My response is, we had a course, beginning a couple of days in advance of their course in Chicago in the year 2001.

Psychiatry, Judge, psychiatry is a course in which the exams are given three to four times a year. We might not have it on our book that on April 23 we're going to be giving a course in psychiatry in Chicago, but we go to each and every one of those, and we put the course on in the city where the exam is to be given immediately in advance of the exam.

And I think the evidence in this case will show that we've done that for years, and we think the defendant knows that.

THE COURT: And how do the doctors know that? Do they know that Osler is going to be there, and which hotel they'll be in, and that kind of thing?

[p.17]

MR. TRUEBLOOD: Osler has an extensive advertising system. They advertise in journals.

In the case of PsyPrep, they have a very pretty, nice web page and have had that on the internet for approximately the end of February of the year 2001. They put on, my memory is four courses in the year 2001 in psychiatry.

THE COURT: All right. So you think in fact there was, you think the evidence will show that there was a program with which this April program for PsyPrep would compete?

MR. TRUEBLOOD: That's my distinct memory, Your Honor. And I also recollect that PsyPrep had a course in effect when the 9/11 problem occurred.

THE COURT: Now, do you agree or disagree with the representation by defense counsel as to what his client did from December of 2000 to January of 2001 regarding this program?

MR. TRUEBLOOD I disagree as to his analysis of scope. What I'm about to answer is based on an affidavit that's been given to me, sworn answers to interrogatories, the deposition of Lois Forde. And from those documents I'm able to tell you that Lois Forde has testified that she was called by Dr. Rosenbaum from Stanford University in April of 2000 and asked about assisting with such a venture.

There is considerable, there are considerable inferences [p.18] and implications from the evidence that she may well have been involved in this before that period of time, but certainly she testified Dr. Rosenbaum first contacted her.

She met with Dr. McClung, whereupon She obtained a post office box number. She obtained a toll free telephone number. The telephone was placed in her home in Washington, under the name of PsyPrep, LLC.

She edited, laid out, and printed brochures. She made inquiry as to developmental costs. She determined deadlines for the various journals in which advertisements could be placed. She discussed and made inquiries on the subject of equipment needs, course contents, organization of the course.

She obtained the business license for PsyPrep, LLC. She registered it with the IRS. And it is true that on the 29th and 30th of January in the year 2001, Your Honor, she did turn

materials over to Mr. Mobley. Mr. Mobley lives outside of Indianapolis. That process took two days.

I would further say to you that one thing Lois Forde did was make considerable effort and inquiry from Dr. Selliken as to whether he could produce the document that's attached to plaintiff's complaint. Initially, he had trouble finding it. But he did talk to her on regular occasion, including their family homes in Grafton, North Dakota, at a meeting, about the subject of her having served, we allege, as a de facto director of the corporation, and having taken the minutes at [p. 19] four separate annual meetings, and there being discussed there many things, among which, Your Honor, was a certain lawsuit referred by a former Osler employee, who decided after a month to get in the business and go head to head against Osler.

Mrs. Forde in Chicago one night stayed late while Dr. Selliken typed a pro se, while Dr. Selliken dictated a pro se brief to be filed before the Indiana Court of Appeals, and he and she rushed it to O'Hare to get it in the mail so it would be timely received in Indianapolis.

We allege Mrs. Forde was perfectly aware--

THE COURT: You are just a little ahead of me there.

MR. TRUEBLOOD: I'm sorry.

THE COURT: What I'm after here is, if she quits this company on the 29 or 30th of April, how can it be said that she violated this clause if it is true that the printed brochures were never sent out?

MR. TRUEBLOOD: I don't have that agreement in front of me, but I believe it contains the words, announced or planned.

THE COURT: And it does. It says, prohibited from any competing program plan. So that's what you think; that if she was involved at all in the planning of that and quit three months before, she is still involved in the planning of it?

[p.20]

MR. TRUEBLOOD: Well, Your Honor, yes. She is very much involved in the planning based on this list of things that I just read to you about her working on course contents, general organization, et cetera.

THE COURT: She picks the doctors, and the doctors do the teaching, right?

MR. TRUEBLOOD: At this point, Your Honor, she is an equal member in PsyPrep, LLC.

THE COURT: I understand that. I understand that. But the point is in terms of program planning, specifically what does she do to plan it other than call the hotel and arrange for patients to be there, which she has alleged at this point that she hadn't done for that program?

MR. TRUEBLOOD: I don't have the agenda of the seminar, but when she testifies that she's involved in course contents, general organization, discusses equipment needs and that sort of thing, I inferred from that that she was involved in

who's going to go first, who's going to go second, what subject will "A" address and what subject will "B" address.

THE COURT: But not on the specifics of what's going to be talked about. She wasn't going to go teach?

MR. TRUEBLOOD: I think that what Lois Forde testified to in her deposition was that she went, she picked which courses she wanted to head up, and she oftentimes did [p.21] the psychiatry courses. And when she did the psychiatry courses, every time, either Dr. Scurria, Dr. Baum, Dr. McClung or Dr. Rosenbaum, at least one of them was there, and generally more than that.

THE COURT: Okay. Now, with this notion that you have that if she participated in the planning of it some three or four months before it's actually produced, was there such, did this company have a program in April? PsyPrep?

MR. TRUEBLOOD: Yes, it did, in Chicago.

THE COURT: And so you think, then, that this liquidated damages clause -- how is it you think that clause then affects how much your damages are?

MR. TRUEBLOOD: I think it affects it in terms of $10,000 per day.

THE COURT: So, do you know the total revenue that was collected by this competing program for the registration and other fees?

MR. TRUEBLOOD: Judge, I asked those questions of Dr. McClung, and he refused to answer.

THE COURT: So you don't know that?

MR. TRUEBLOOD: I don't know.

THE COURT: You don't know the total amount expense to plan, announce or produce the competing program?

MR. TRUEBLOOD: No, Judge. I can tell you that when Dr. Selliken testifies, he will testify that there may be [p.22] anywhere from 150 psychiatrists. He's had as many as 300, and generally an across-the-board cost is a thousand dollars a day.

THE COURT: So you think that it is appropriate to assess under this contract $10,000 a day for the actual program that took place in April; is that right?

MR. TRUEBLOOD: Yes, Judge.

THE COURT: So how many days was it?

MR. TRUEBLOOD: Three days.

THE COURT: So you think that it should be $30,000?

MR. TRUEBLOOD: For that course, yes.

THE COURT: And you think this damages clause applies to other courses?

MR. TRUEBLOOD: Yes, Judge. I think it would be reasonable for the Court to find that it applies to four courses that were put on in the calendar year of 2001.

THE COURT: And that is because?

MR. TRUEBLOOD: Well, they didn't start PsyPrep, Your Honor, I would argue, to put on one seminar. In fact, they did put on four seminars.

THE COURT: Will you have evidence that she planned or announced or produced any other program other than the one in April?

MR. TRUEBLOOD: No. I mean not in any specific sense of the word.

[p.23]

THE COURT: Okay.

DR. SELLIKEN: Excuse me. There is evidence.

THE COURT: Do you want to consult with your counsel?

DR. SELLIKEN: Yes.

(Discussion outside the record.)

MR. TRUEBLOOD: The deposition of Dr. Mark McClung was taken in Seattle, and he testified that when they met in San Francisco -- he, Lois Forde and some others -- that

they were planning at that point to put on three or four courses that year.

THE COURT: You think that's enough?

MR. TRUEBLOOD: I think it makes sense that they would be planning other courses. And I think that when this effort was made, it was made with an eye toward the long haul.

Excuse me just one second.

THE COURT: All right.

(Discussion outside the record.)

MR. TRUEBLOOD: My client's memory of that deposition, Judge, is that it was three or four courses without end, into the future.

THE COURT: And so you think that you get $10,000 a day from this woman from this contract for every one of the days of these programs ad infinitum?

[p.24]

MR. TRUEBLOOD: No, no.

THE COURT: You have generously decided two or three years?

MR. TRUEBLOOD: Judge, I assume that's what the court would decide in interpreting this contract.

THE COURT: Okay. A reasonable thought.

MR. TRUEBLOOD: Yes.

THE COURT: All right. Now, you do agree -- I shouldn't say "you do agree." You can agree if you want to; you don't have to agree.

The law is, isn't it, that the $10,000, the general statement of damages, without having to go into specifics because either the defendant hasn't told you, or they are too hard to determine, but that $10,000 has to be, that amount of liquidated damages has to be in proportion to the damage suffered by the individual who is seeking to enforce the clause. You understand that?

MR. TRUEBLOOD: Judge, I've read your opinions on the subject, yes. Yes, I agree with that. It has to bear -it can't be a penalty.

THE COURT: Right, right. So to that extent, how do you confront the argument that the defendant makes that because your client makes more money now than he did before, that he doesn't have any damages?

MR. TRUEBLOOD: I'm glad you brought that up, Judge.

[p.25]

THE COURT: Well, thank you very much.

MR. TRUE BLOOD: Yes. Osler Institute has been around for a good while. It has recently purchased a large former hospital south of Terre Haute called Charter Hospital. Charter of Terre Haute, Inc., something like that. And one of the things that it has done preparatory to making such a large expenditure has been to make investments from time to time.

Much of the increase to which counsel refers, I'm advised by Osler's CPA, was based upon those sales. Osler itself can offer specific evidence at trial as to what that liquidated damages would represent. But, you know, Judge, if you put on a course, and you've got 200 doctors there, and they are paying 1,000 bucks apiece, I think you can see the kinds of gross dollars that are there to be generated.

THE COURT: So your loss then is what?

MR. TRUEBLOOD: Our loss would be on a given course --

THE COURT: We are talking about the April course. Let's talk about the April course. What was your loss?

MR. TRUEBLOOD: Judge, he refused to answer those questions. I don't know what our loss was.

THE COURT: Who refused to answer those questions?

MR. TRUEBLOOD: Dr. McClung.

THE COURT: I want to talk about you. What were [p.26] your losses?

MR. TRUEBLOOD: Well, I can tell you, Judge, that we increased our expenditures for advertising considerably.

THE COURT: For April?

MR. TRUEBLOOD: For April of 2000.

THE COURT: In the amount of?

MR. TRUEBLOOD: May I check?

THE COURT: Yes.

(Discussion outside the record.)

MR. TRUEBLOOD: My client was pointing out to me that the profits dropped enormously in psychiatry. He does not have those numbers with him today.

THE COURT: Were you asked to produce those numbers at any time?

MR. TRUEBLOOD: Not that I'm aware of.

THE COURT: I'm talking about April. I'm not talking about the rest of them.

MR. TRUEBLOOD: Was I asked --

THE COURT: I would just like to know if your evidence will prove, will your admissible evidence show how much you had to increase your expenditure for ads in April or for the April program?

MR. TRUEBLOOD: I would ask Dr. Selliken that, yes.

THE COURT: And that amount would be in a range of what ?

[p.27]

MR. TRUEBLOOD: I would guess 20,000 to 40,000. That's a guess.

THE COURT: That he wouldn't have spent otherwise?

MR. TRUEBLOOD: He spent because he was head to head with another seminar.

THE COURT: And what other loss?

MR. TRUEBLOOD: Well, whatever falls under the word, marketability. The marketability would have increased dramatically.

THE COURT: What are we talking about there?

MR. TRUEBLOOD: I'm not sure, but I know advertising costs would be principal.

THE COURT: All right. I think that addresses the issues that I wanted to address on those.

Now, I've not gotten into some of these other issues yet, and I will, I mean the one on the other causes of actions because I want to talk a little about the slander and a little about this breach of fiduciary duty.

MR. TRUEBLOOD: Thank you, Your Honor.

THE COURT : You' re welcome.

And so I'd like to afford counsel for the defendant an opportunity to raise whatever issues he might want to raise based on what plaintiff's counsel has suggested.

MR. MODESITT: Your Honor, I think in an evaluation of the noncompete clause, the key aspect that needs to be [p.28] focused on is the date of April 15 of 2000 contrasted to April of 2001.

Lois Forde left the employment of Osler in April of 2000. The key is what programs were being planned in April, 2000, when she terminated from the corporation, being Osler, which programs would have been in direct competition with a later venture. And the answer is zero.

There were no programs being planned by Osler in April of 2000 to be held in Chicago in April of 2001. In fact, the evidence is going to show, and counsel just alluded to the fact that Osler, quote, "always holds these exams in the city in which the exam is to be held."

PsyPrep planned its program in a courteous manner so as, (a), not to compete with Osler and, (b), not to be in the same city. The exam for spring of 2001 was not held in Chicago, Illinois.

When the April program in 2001 was announced ultimately by PsyPrep individuals, the program of Osler was to be in another city in May of 2001.

You heard counselor indicate he spent all this money to go, quote, "head to head." That was an Osler decision. They changed the date of their planned seminar, the city of their planned seminar, and had to readvertise it for April instead of May. Those are facts.

Another thing counsel was discussing with you were the [p.29] responsibilities of Lois. And I think if you take Lois's responsibilities as Mr. Trueblood thinks they were, which he expanded in my view, but even taking those, that does not create protectable interest. Indeed, anything in the public domain is not protectable interest.

On Osler's website you can get complete list of the faculty for each of these meetings. On Osler's website you can get the advertising data, the brochures, whatever you would like to get.

Anything that becomes known is not protectable and is not a trade secret. And there isn't anything that I have heard yet that would qualify as confidential information that Lois Forde, (a), even had. And if it's assumed that she could have had, there is no indication anywhere in the record that she ever used it adversely.

And the Southern District Court has held on other occasions that even under the Trade Secret Act of Indiana, in Title 24 -- I think it's 24.2-3-2, I think, in Title 24 -- it's not that you might think about violating it. You must actually misappropriate it. And there is no allegation that anything was misappropriated in this case, and there is certainly no evidence to suggest that it was.

And, again, on the liquidated damage element, if plaintiff had felt that it was important enough to obtain the information it might have wanted from Dr. McClung's entity, [p.30] there are legal mechanisms to do so, none of which were exercised. But I will tell the Court that we will produce evidence that at that seminar in April, I believe there were either 12 or 13 participants, and that's all. Out of all the seminars they've had so far, I believe there has only been four, and one a make-up because of the 9/11 event. It was either in progress or planned or something, and then they rescheduled it.

There has never been a total of more than 19 participants at any of the PsyPrep seminars, and I'll represent to this Court as a fact.

THE COURT: All right. Anything else on these issues?

MR. MODESITT: No, Your Honor, not as you have --

THE COURT: I'm going to talk about a couple of other issues. I'd like to address briefly this breach of fiduciary duty, this notion of de facto director.

MR. MODESITT: I'd love to. Do you want me to start?

THE COURT: Yes, I'd like to you start that on that.

MR. MODESITT: All right. In late 1998, Dr. Selliken had inquired of Dr. Darryl Heustis, who is with the Veterans Administration Hospital in Loma Linda, California, and who has been on the faculty on the pathology courses I believe almost since Osler was originally formed, [p.31] but at any rate for a long time, he was asked along with Lois Forde if

they would be interested in joining the board of directors. At no time prior to 1992 is there a single official minute available for review, and indeed under responses to motions to produce it's clear that there are none. Lois was asked, as was Dr. Heustis, to join the board, and they both gave the same response: If you do an audited financial statement of the books and records, and if you provide directors and officers liability insurance, we would consider joining the board.

The plaintiff's position is because they attended, they are therefore de facto officers or directors.

I do not dispute the fact that one can become a de facto director. There is that in the law. But what plaintiff omits in his briefs on more than one occasion is that you can only become a de facto member if the member to whom the status is being attributed consented in the first place.

The evidence is undisputed. We have deposed Dr. Heustis. We have deposed Lois Forde. The minutes themselves set up the exceptions or the conditions precedent to joining the board.

Lois Forde at no time acted under color of authority or color of title. She simply sat in the meetings. And that does not make her a de facto member, and it does not impose upon her a fiduciary relationship. In fact, there was [p.32] another person who sat in on the board meeting in January of 2000 in San Diego who wasn't anything other than another part-time employee of Osler who was another relative of Dr. Selliken and of Lois Forde. That was Julie Selliken. She wasn't anything, but she sat in on the meeting. Does that make her a fiduciary? I suggest it doesn't.

THE COURT: There is an allegation that she signed minute[illegible] board member designate. Is that true?

[illegible]ODESITT: That's true.

THE COURT: Where does that come from?

MR. MODESITT: They asked her to take minutes of the meeting. No one had ever in the history of this company taken minutes, and for these particular four meetings she took minutes and signed them as a designate. And she was a designate if in fact the corporation had complied with the two conditions precedent, neither of which were ever done.

THE COURT: So you think this is a way to make her a board member without giving her insurance?

MR. MODESITT: Well, I think maybe that's the way Dr. Selliken tried to create a fiduciary when she wasn't one.

THE COURT: So this way he gets the best of all possible worlds.

MR. MODESITT: No, Dr. Selliken gets the best of all possible worlds.

THE COURT: That's what I said.

[p.33]

MR. MODESITT: In addition, even more critical than that is under Indiana law information on tax returns is prima facie evidence of certain facts. The tax returns filed with the federal

government asked who are the officers and directors, and at no time was Lois Forde ever listed. The annual return of the not-for-profit corporation required by the Secretary of State of Indiana asks the same question, and at no time was she ever listed. That is an indication that even the corporation did not consider her a member of the board of directors or an officer of that corporation.

THE COURT: All right. Well, let's go ahead and deal with the rest of these two, and then we'll get them all at once.

Let's talk about slander here just a second.

MR. MODESITT: Certainly.

THE COURT: What in your view is the alleged publication of the slander?

MR. MODESITT: Well, I just found out the other day, when Mr. Trueblood mailed me an affidavit of Ms. Julie Selliken Carter, and I don't know if it's filed in this Court or not. If so, I don't know why it's filed and would move to strike it from the record.

We had asked in interrogatories, we finally got a response to the effect that Lois is alleged to have inquired as to whether Dr. Selliken may have taken this patient in [p.34] San Diego to a motel. Now, that is the allegation.

Even if you assume that to be correct, it's not slander. And whether or not that remark would be a slanderous remark is, of course, up to the Court to decide and is a question of law for the Court and not for the jury.

But the facts belie the assertion in the first place. We deposed a young lady named Sherry Russum, who was there at the same time with the same individuals, and she said it was she who made the inquiry as a rhetorical question: Do you suppose he did that? To which everybody said: No, we don't think he would have done that.

But the more -- that's basically the gist of what is -- and in this alleged affidavit that was just furnished, Lois allegedly had mentioned: Well, even if he didn't take her to a motel, it's the perception that was bad.

Well, that happens to be true. The perception is bad. Dr. McClung testified in his deposition that it would be horrible judgment, especially for a pathologist at a psychology meeting to take a psychotic woman off premises alone, which imposes upon them a potential problem because of the patient/client relationship established at the meeting and because the individual who removed the patient was not a psychiatrist, not to mention the fact that he wasn't in charge of the patient at the time of the removal.

And there is no suggestion that he did not remove the [p.35] patient from the premises. In fact, the affidavit of Ms. Carter clearly recites they spent time restaurant shopping on the third day and ordering dinner for the afternoon when she was supposed to be a patient at this seminar.

But in any event, I don't believe the comments were slanderous, without going beyond the other legal aspects of whether slander can even be maintained by a corporation of a not-for-profit stature.

THE COURT: All right. Thank you.

And so, Mr. Trueblood, what is your view on this fiduciary duty?

MR. TRUEBLOOD: One of Lois Forde's duties in being the senior administrator of Osler Institute at a course was to handle thousands of dollars. She would be given maybe $5,000 before going off to a three-day course, and within 15 days or so she would then account, 15 days after the course was over, she would then make an accounting and send that back. Now, that's obviously a fiduciary duty.

Then there is this issue about whether she was a de facto director of this corporation. We know the following things: We know that she attended four consecutive meetings. We know she signed her name as secretary designant. We know that she received $200 in cash for each meeting. We know we have photographs of her at Dr. Selliken's mother's where one of [p.36] the meetings was held. We know confidential information was discussed, and that she gave her opinions on such things as hiring, firing, and discipline of Other employees.

THE COURT: These are in the minutes of the meeting?

MR. TRUEBLOOD: They are either in the minutes or they are within the body of evidence. And by body of evidence, there has been reference to an affidavit that I sent to Mr. Modesitt because there was some concern when the Court initially met with us on the 10th. The Court mentioned that, and so I filed that and furnished that to Mr. Modesitt.

In that affidavit, interestingly Julie Selliken mentions that next to Dr. Selliken, Lois Forde was the most active participant at the board meeting.

Now, what Ray Modesitt told you is absolutely true.

Dr. Heustis did testify that he said he would never be a board member unless there was an outside audit and unless there was liability coverage. Errors and omissions coverage, I presume. That's what he said.

Can one go to a board meeting and promise to organize a corporate retreat get-away -- apparently a lot of discussion had to do with Chicago, Illinois -- and take steps and act towards doing that, though it never occurred, and maintain independence from the corporation? Can one give opinions about who to hire, who to fire, who to applaud? This information is in the minutes. Our position is that she [p.37] acted as a de facto director.

Whether she is de facto director or not, she was the person that the Osler Institute chose to put in direct relationship with the faculty. She was the one who was there to know the faculty's perceptions of what they were to do and how they did, and she picked up the faculty recommendations from the doctors after the presentations were given. She had access to all of that.

I should also make the point, Judge, sometimes we end up proving negatives here instead of declaratory things, but I think all the evidence is that with respect to Mr. Modesitt's assertions that neither his client nor Dr. Heustis saw the corporate financials or spreadsheets, Dr. Heustis also

testified that he never asked for them. I believe that they went to these meetings; they took the money for going to the meetings; they were asked their opinions of things; they gave their opinions. And it's true that this is not a corporate board meeting where somebody says: And I make the following formal motion and second and question, et cetera. But it was a discussion, and a consensus was reached on each of the points. And that's how they did their business. It's not the most formal in the world, but the law doesn't require the greatest formality in the world.

THE COURT: I've got a couple of questions for you, but I need to step down for just a minute. I'll be right [p.38] back.

(The Court recessed from 11:05 a.m. to 11:15 a.m.)

THE COURT: I want to look again at this fiduciary relationship that stems from your view that she's a de facto director. What specific fiduciary duty is it, assuming that she was on the board of directors for that period of time -- well, I guess I should start with, is it your view she was on the board of directors for those four meetings or onthe board of directors for some other period of time?

MR. TRUEBLOOD: My view is based on Dr. Selliken's testimony, and that would be that in 1995 or '96 they had a meeting, and at that meeting it was determined orally -- there is no minute that says this. It was determined that he would be president, his wife, Sunhee Selliken, would be vice-president, and that Lois would be secretary. And that it was not until 1997 that this issue came along from Dr. Heustis.

THE COURT: well, when is it that in your view, when did she cease to be a corporate director? Or is she now?

MR. TRUEBLOOD: I asked her on deposition, and she said she does not regard herself as a director.

THE COURT: I understand. But in your view, when does she cease to be a corporate director?

MR. TRUEBLOOD: The problem I have in answering this is that she says that one of our employees told her that she [p.76] was fired about the 19th of April of 2000. And Dr. Selliken's testimony will be that he never fired her at all. It was not his intention to fire her, but that this other employee who resigned the day before this was allegedly communicated to her.

So, she says she is not a director. I'll take her word for that.

THE COURT: That she was not a director as of --

MR. TRUEBLOOD: As of April 19, 2001 -- or 2000.

I'm sorry.

THE COURT: So that when the actions occurred of which you are complaining, she was not a director?

MR. TRUEBLOOD: That's correct.

THE COURT: So where is the fiduciary duty? How does the fiduciary duty breach work into this, then?

MR. TRUEBLOOD: Well, Judge, I think that our brief suggests the fiduciary duty can arise from the fact she was an employee, or it can arise from the fact she was a director.

If I work for one company and I'm drawing a paycheck from that company when, if, and as agreed, then my duty is to continue not to compete against that company by working for somebody else part time.

THE COURT: But if she's not a director as of the 19th of April of 2000, what fiduciary duty did she breach, [p.40] assuming that she did all the things that you've alleged that she did between December and April of 2002?

MR. TRUEBLOOD: The older cases talk in connection with that with a breach of a duty of loyalty, also.

THE COURT: But the actions occurred after she was no longer on the board, even if I thought she had been on the board; isn't that true?

MR. TRUEBLOOD: Yes.

THE COURT: What are your damages for breach of fiduciary duty, I guess? We'll just ask that.

MR. TRUEBLOOD: I think they would be such as the evidence would show to the finder-of-fact. I mean, I don't have any -- I don't have any formula to tell you that.

THE COURT: Okay. Then the next question is, what fiduciary duty did she breach? If she's not a member of the

board after April, what continuing duty does she have to the board?

MR. TRUEBLOOD: She has the contract. And as I read the contract, those duties are inherent for three years upon termination.

THE COURT: So that the contract is an essential part of your fiduciary duty claim?

MR. TRUEBLOOD: Yes, Your Honor.

THE COURT: I just wanted to be sure that I understood that.

[p.41]

Okay. Now, let's look at the slander claim.

You've got the Carter affidavit here, and it may or may not be timely. Give me your best argument here that the allegations which you make would support a slander claim.

MR. TRUEBLOOD: Judge, my position is that it's slander, per se, to say that a doctor took a psychiatric patient to a motel.

THE COURT: And the damages for that are?

MR. TRUEBLOOD: The damages for that would be again that's clearly subject to what a finder-of-fact would --

THE COURT: I understand. What's your argument on that? What are you thinking?

MR. TRUEBLOOD: I think we ask for a couple of hundred thousand dollars for that.

Now, Dr. Selliken is oftentimes referred to as Dr. Osler, who, of course, has been dead for 50 or 60 years, but he is oftentimes regarded as the alterego of the Osler corporation. And that's something that the Court also is going to have to look at, is whether a not-for-profit corporation can maintain an action for a slander of its principal officer.

I think it's slander per se, and I think it fits squarely within the, squarely within the California code which defines slander.

THE COURT: So you agree this is California law?

MR. TRUEBLOOD: I think it has to be.

[p.42]

Now, there is some argument in the defendant's brief to the effect of, well, okay, even if she said that, nothing was said about it. She wasn't disciplined and all that sort of thing.

And the answer to that is quite simply that Julie Selliken Carter did not tell Dr. Selliken about this for over a year after it happened. He didn't know it had happened.

THE COURT: All right. Let me check my notes here. I think I'm done with you. Let me look again.

MR. TRUEBLOOD: Can I add one thing, Judge?

THE COURT: Sure.

MR. MODESITT: In Mr. Modesitt's last brief, well, in both of them there is quite a discussion of equitable estoppel, sometimes called estoppel in pay. That is a defense, and it's a defense that was not pled in this case. He says he disagrees with me. I didn't see it in the answer.

THE COURT: All right. Now, I do have another matter here that I wanted to discuss with you briefly.

You have indicated that it is your view that the defendant here has some trade secrets and has learned confidential information from her association with Osler Institute. What is the proprietary nature of any secrets that she may have acquired, or how is it that you allege she has used those secrets or the confidential information?

MR. TRUEBLOOD: Judge, I think the answer to that [p.43] question goes directly to what value does Osler get out of her duties as chief administrator on site at a course. And that is, (a), to make the corporation aware if any doctor is unhappy for any reason, to make the corporation aware if any participant is unhappy, any doctor -- now, see, I've got doctors and doctors -- any student doctor is unhappy, whether there is cause for concern to try to alleviate those problems as much as can be reasonably done.

This is confidential information. The information in grading the doctors, that's confidential information.

Trade secrets, I think, I think that's a stretch. Trade secrets as they are defined in Indiana, at least, are fairly more narrow than that. Indiana takes a pretty conservative view about that.

(Discussion outside the record.)

MR. TRUEBLOOD: My client is reminding me, Judge, one of the things they do periodically is give faculty, the teachers, the best teachers bonuses; that Lois Forde was involved in that process, and that that would be a trade secret.

THE COURT: You mean in the process, she would decide who to give the bonus to and who not to?

MR. TRUEBLOOD: Yes.

THE COURT: And have the list of criteria developed by Osler that she would know?

[p.44]

MR. TRUEBLOOD: I presume there would be criteria, yes.

(Discussion outside the record.)

MR. TRUEBLOOD: The point is being made that the evaluation of the faculty is a trade secret at that point because that data will be used by the corporation presumably in interpreting who to employ next time around at what course and what that particular instructor is excellent at.

THE COURT: And so then this is a process that she participated in? She would make those decisions?

MR. TRUEBLOOD: She was one of the people.

THE COURT: Okay. Anything else you want to say just for the clarification of the Court?

MR. TRUEBLOOD: You had asked about jurisdiction at our first meeting several days ago.

THE COURT: Right.

MR. TRUEBLOOD: I think our 4.4 clearly is covered in this case by her activities. I'll not belabor that because it's been briefed.

THE COURT: All right. Thank you.

MR. TRUEBLOOD: Thank you.

THE COURT: All right, counsel.

MR. MODESITT: I'd like to make first a couple of comments, Your Honor, about alleged trade secrets. And to do so, I would like to go directly to the employment agreement [p.45] itself. What the agreement says is, thou shalt not misappropriate or retain or disclose. There is no evidence in here that Lois Forde did any of those.

The only people with whom she sought to associate were the doctors to whom were given by Osler their own faculty

evaluations. Once given to them, there can be no misappropriation of them.

There is no indication that Lois Forde ever tried to secure any other faculty or ever tried to do anything with any evaluations of unknown persons with regard to that.

I think the Southern District has already indicated, I think it was Judge Tinder in the ICONimation case or in one of the Southern District cases, at any rate, that trade secrets in and of themselves, while may be protectable, there has to be an actual misappropriation of the trade secret. And there is no such allegation in this case.

Another thing that I'd like to comment upon with regard to counsel's references to slander is, (a), I do believe it's the Court's purview and in fact legal duty to determine if in fact the alleged statements are taken as true, would they be otherwise slanderous. (a), we deny that they are true. But for the purpose of argument, if they were true, are they slanderous?

What does the evidence that we have before us say that Lois Forde said? Quote: "Lois asked me if I thought Joe would take Tracy to a motel." Is that slanderous? I submit it is not.

She told them that Dr. Selliken had gone for hours with a patient, which is true, and she was worried that he might have taken her to a motel. Is that slanderous? I suggest it is not. That's the first item of inquiry.

And then if the Court thinks, well, maybe it is a slanderous statement, then you come to the question: Is it actionable? And I submit to the Court, it's not actionable at all. If Joe Selliken thought he was slandered, he had every right to sue whoever he thought had done it.

What I did not put in my brief, and I'll mention it now, is that under California law, Your Honor, the statute of limitations for slander is one year by civil code in California. More than one year elapsed since the alleged utterance of this statement and filing of this lawsuit.

THE COURT: Anything else you want to add?

MR. MODESITT: No, Your Honor.

THE COURT: All right. I appreciate your arguments, and I'll do my best to give you a ruling on this without too much delay. Thank you very much.

(The Court adjourned at 11:30 a.m.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE MATTER.

/s/_____
Kathleen Andrews
Official Court Reporter

Date: 8/23/04

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 01-019-C-M/H

[Filed July 8, 2002]

THE OSLER INSTITUTE, INC.,	)
Plaintiff,	)
	)
vs.	)
	)
LOIS FORDE,	)
Defendant.	)
	)

ENTRY FOR MONDAY, JULY 8., 2002

THE HONORABLE LARRY J. McKINNEY, CHIEF JUDGE

Parties appear by counsel for final pretrial conference during which the parties discussed the issue of damages related to the plaintiff's, The Osler Institute, Inc. ("Osler"), damages for breach of the employment agreement. In addition, the Court discussed the lengthy trial brief filed by the defendant, Lois Forde ("Forde"), in which it is apparent that there are several issues that may be resolved before trial as a matter of law. Osler indicated that it was not prepared to

argue all the issues at the pretrial conference. It is clear that these issues must be resolved before the case is presented to a jury and the Court will not resolve the issues of law without proper argument by the parties. Therefore, the Court hereby **VACATES the trial set for Monday, July 22, 2002**, in Terre Haute, Indiana. The Court hereby **sets a hearing**, at which the parties shall argue the issues raised by the trial briefs in this cause, and the parties shall appear with counsel, **on Monday, July 22, 2002, at 10:00 a.m., in Courtroom 202, U.S. District Courthouse, 46 East Ohio Street, Indianapolis, Indiana**.

Distribution attached.

Distributed to:

Stephen L. Trueblood
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P.O. Box 10068
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APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Cause No. TH 01-019-C-M/H
Indianapolis, Indiana
July 8, 2002
10:00 A.M.

THE OSLER INSTITUTE, INC.,)
Plaintiff,)
)
vs.)
)
LOIS FORDE,)
Defendant.)
)

Before the
HONORABLE LARRY J. MCKINNEY

OFFICIAL REPORTER'S TRANSCRIPT OF
PRE-TRIAL CONFERENCE

APPEARANCES:
For the Plaintiff: Trueblood Law Firm
By: Stephen L. Trueblood
P.O. Box 10068
Terre Haute, IN 47801

Transcript Pre-Trial Conference, dated July 8, 2002

For the Defendant: Wilkinson, Goeller,
Modesitt, Wilkinson & Drummy
By: Raymond H. Modesitt
P.O. Box 800
Terre Haute, IN 47808

Court Reporter: Glen L. Cunningham, CM
291 U.S. Courthouse
Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND

TRANSCRIPT PRODUCED BY
COMPUTER-ASSISTED TRANSCRIPTION

[p.2]

(In chambers, 10:00 o'clock A.M.)

THE COURT: This case is set in two weeks. This is Osler versus Forde, and this case is set in two weeks. Today is Monday the 8th of July. I think this is set on the 22nd. Is that right?

MR. TRUEBLOOD: Yes.

MR. MODESITT: Yes.

THE COURT: Well, most interestingly two weeks from trial, I guess three weeks from trial, we got trial briefs. These trial briefs raise some troublesome issues, which I would like to discuss a little bit today.

My first question is for both of you. Are you ready to argue these issues raised in this trial brief today?

MR. MODESITT: Yes, Your Honor.

MR. TRUEBLOOD: I could be better prepared, but I'll do the best I can.

THE COURT: Okay, that is what I would like to do, because some of them appear to be relatively dispositive of some issues that may or may not be presented at trial.

MR. TRUEBLOOD: My hesitancy, Judge, is that I didn't get Ray's trial brief until moments ago.

THE COURT: You didn't?

MR. TRUEBLOOD: He says he mailed it.

MR. MODESITT: I don't know where it went.

MR. TRUEBLOOD: I haven't seen it. I haven't [p.3] received it.

THE COURT: Well, it is a pretty serious trial brief. It is not your basic fundamental trial brief that you get two weeks before trial, and I would suggest that you need more than two minutes to look at this because there is an issue here on defamation that is fairly dispositive. There are issues on the interference with contractual relationships, and there are some serious matters about the validity of the employment contract signed by Miss Forde. So some of those issues could, in fact, impact the Court's jurisdiction in this case.

Where does Miss Forde live? Or where did she live at the time of the –

MR. MODESITT: Washington.

THE COURT: Where is the Osler Institute?

MR. MODESITT: Terre Haute, Indiana.

THE COURT: There is a possibility that rulings in this case could impact jurisdiction because there may not be that much money involved in this case, given some of the things that he has raised. So you need the time that is appropriate so that you can tell your client you had the appropriate time and nobody hustled you into an argument.

Now, both sides have been in settlement negotiations in this case for sometime, haven't you?

MR. TRUEBLOOD: Yes, Judge, considerably.

[p.4]

THE COURT: Let me just ask you this: What is the -- what is your damage on the contract -- or, yeah, on the contract claim on the notion that she evidently did something she shouldn't have done, having signed a non-compete clause? How do you calculate your damages for that?

MR. TRUEBLOOD: Well, Osler had relationships with various faculty. We contend that a part of our damages are that Lois Forde combined and conspired with certain other members of our faculty with whom we had no non-compete

agreement to leave us, formed an organization called Sci Prep, LLC, which now directly competes with us. She, upon leaving us --

THE COURT: Is she still with that group?

MR. TRUEBLOOD: No, Judge. I wrote a draft of the complaint and sent a copy of the contract, which she had signed, but which she believed she had not signed, apparently.

THE COURT: Uh-huh. And then she quit?

MR. TRUEBLOOD: And at that point -- well, within 15 days she quit.

MR. MODESITT: Within two days.

MR. TRUEBLOOD: She claims to have quit on the 23rd of January of 2001, but she admits working with her successor on the 30th of January, 2001.

[p.5]

THE COURT: One of my concerns, when the issue is raised by the defense in this case, is what did Miss Forde do that required a non-compete agreement? What was it that she did that would have been damaging? What knowledge could she take from Osler and give to Sci Prep and hurt Osler?

MR. TRUEBLOOD: Well, she had pretty much been at every psychiatry course. She arranged the faculty.

THE COURT: When you say she arranged the faculty, what do you mean by that?

MR. TRUEBLOOD: She got on the phone, she hired them, made sure they were there at the right times and places.

THE COURT: She called the teachers?

MR. TRUEBLOOD: She was the main person on site.

THE COURT: Did she hire the hall too?

MR. TRUEBLOOD: The hall was hired by others.

THE COURT: Her job was to call the professors?

MR. TRUEBLOOD: She got the professors. She got, to the extent theirs was a continuum of presentation, she got that worked out. She --

THE COURT: Let me get that right. What was it --what did she have to do with the actual presentations?

MR. TRUEBLOOD: Oh, well, she wouldn't have anything to do with the actual presentations.

THE COURT: But this continuum business, I don't [p.6] know what you mean by that.

MR. TRUEBLOOD: Well, I'm thinking that, okay, the students come there. The students are doctors who are seeking to be board certified.

THE COURT: Right.

MR. TRUEBLOOD: And they come there, they get their presentations, an orderly presentation, then she goes into mock oral examinations, which means we have arranged for psychiatric patients to come there.

THE COURT: Okay.

MR. TRUEBLOOD: She arranges that sequencing.

THE COURT: So she makes sure that people get there when they are supposed to be?

MR. TRUEBLOOD: She makes sure the faculty gets fed, they have a place to have meals afterward, that kind of thing.

THE COURT: What knowledge did she gain from Osler that she took to the other institute that causes you your trouble?

MR. TRUEBLOOD: The nuts and bolts of putting on the medical seminar.

THE COURT: Are you concerned that she took the phone numbers of the doctors -- of the teachers?

MR. TRUEBLOOD: Well, we know she had those at one point. As a matter of fact, she became friends with these [p.7] five psychiatrists.

THE COURT: Did she ever put one of these on for somebody else?

MR. TRUEBLOOD: Other than Sci Prep?

THE COURT: Did she put one on for Sci Prep?

MR. TRUEBLOOD: Actually, she didn't. She arranged it. The first one was set in March and she quit in January.

MR. MODESITT: It was set in April.

MR. TRUEBLOOD: Sorry, April.

THE COURT: So she wasn't there when it occurred?

MR. TRUEBLOOD : No.

MR. MODESITT: And did nothing in accordance with it, other than one advertisement that there would be one in April.

MR. TRUEBLOOD: She had the telephone in her home. She has answered the phone.

THE COURT: So what figure do you put on that?

MR. TRUEBLOOD: Well -

THE COURT: How do you calculate the money that you lost as a result of her activities?

MR. TRUEBLOOD: Well, we lost tremendous amounts of money, if the Court hears evidence on the amount of extra advertising we did over what we otherwise would have done.

THE COURT: And that would have been how much, approximately?

[p.8]

MR. TRUEBLOOD: I think in the vicinity of $40,000.

THE COURT: So you have got $40,000 worth of advertising that you did between the time -- well, when? Between the time she quit and the time of the actual event, or what?

MR. TRUEBLOOD: That was relative to the first set of head-to-head competition that Sci Prep came up with.

MR. MODESITT: May I make a --

THE COURT: Just a second.

MR. MODESITT: Okay.

THE COURT: So as a result of having somebody with whom to compete you had to spend $40,000?

MR. TRUEBLOOD: Yes.

THE COURT: And that is within a year or six months?

MR. TRUEBLOOD: I think within about eight months.

THE COURT: How many programs are we talking about?

MR. TRUEBLOOD: I think they advertised four courses in the first year. That is what I have based --

THE COURT: Okay.

MR. TRUEBLOOD: When up talk about damages, Your Honor, what I have done, I had utilized one year.

THE COURT: Okay.

MR. TRUEBLOOD: My client, in answering Ray's interrogatories, doubled that. I had $120,000 worth of damages on the question you are asking because it calls for [p.9] liquidated damages of $10,000 per day.

THE COURT: Okay.

MR. TRUEBLOOD: The contract does.

THE COURT: Okay. And per day of what?

MR. TRUEBLOOD: Well, now that is loose. I mean, that is -- the Court is going to interpret that, but certainly per day --

THE COURT: When do I get to do that?

MR. TRUEBLOOD: Probably any time you want, Judge.

THE COURT: I suggest we do that, if you think that is the Court's prerogative, before the trial starts. We certainly ought to do it before the trial starts, wouldn't you agree with that?

MR. TRUEBLOOD: I think the Court is the sole judge on what the contract means.

THE COURT: Well, then, we ought to have a time when we can argue that and I can make that decision, and we ought to do that relatively quickly. Are you ready to do that today? And I don't want to rush you. I don't want to rush you.

MR. TRUEBLOOD: Yes, Judge, my schedule -- I'm a solo practitioner, and my schedule is such that I have a jury trial in a four and half year old case which begins Wednesday.

THE COURT: Really? So you are looking forward to [p.10] this on the 22nd?

MR. TRUEBLOOD: No, I'm really not, Judge. But it is scheduled and I will deal with that.

THE COURT: I tell you what I would rather do. What I would rather do on the 22nd is hear your arguments on all these issues and then I can reset this case about 30 days later, or not, depending on what we decide.

MR. MODESITT: I would not object to that, so long as whatever remnants may be remaining --

THE COURT: Be set as soon as I can.

MR. MODESITT: In that event I would not object.

THE COURT: And I would like for your clients to be here, and I would like for your clients to be here.

MR. TRUEBLOOD: Yes, Judge.

THE COURT: So we can get all these lovely and talented physicians available to us all in case any of us are depressed.

MR. MODESITT: My client is not a physician. She is just a part-time music teacher.

THE COURT: That is no excuse. I have never heard the part-time music teacher defense before. But, Judge, she is a part-time music teacher.

So that is what we are going to do. I don't anticipate any other briefs.

MR. MODESITT: I'll respond to his.

[p.11]

THE COURT: You want to respond to his?

MR. MODESITT: Supposed to do it by day after tomorrow.

THE COURT: Well, do that on the morning of trial in lieu of trial. I will not have a jury waiting upstairs. There will be no jury across the street. I'll have your oral arguments.

Do you want to hear my new toy? This is how I gavel you out. You ready?

MR. MODESITT: I had one thing that is going to help your law clerk. My daughter, when she worked for Judge Tinder --

THE COURT: Your daughter worked for Judge Tinder?

MR. MODESITT: Yes.

THE COURT: What was her name?

MR. MODESITT: Carol Modesitt.

THE COURT: How long ago was that?

MR. MODESITT: She does employment law, and at that time she was with Locke, Reynolds and, I don't know, I never could figure out --

THE COURT: It was a nice arrangement where she could come over. That was good for everybody.

MR. MODESITT: She told me she always appreciated it when people gave her the cases so she didn't have to print them all. There are all the cases in my trial brief.

[p.12]

THE COURT: Okay, I have read them now.

MR. MODESITT: I really didn't do it for Your Honor. I did it for Your Honor's clerk.

THE COURT: I wouldn't have anybody working for me that couldn't answer this question. What does that case say if they can't answer that? I don't need them, but this woman answers that extremely well. So that is what we will do.

MR. MODESITT: All right.

THE COURT: I would rather not have to do that, but I think we better do that.

THE LAW CLERK: In Terre Haute, sir?

THE COURT: No, here. I would rather do it here.

MR. MODESITT: That is fine, I would rather do it here.

MR. TRUEBLOOD: 10:00 o'clock?

THE COURT: That would be dandy.

(The Court adjourned at 10:25 P.M.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE MATTER.

/s/_____ 1/6/03
GLEN L. CUNNINGHAM DATE
OFFICIAL COURT REPORTER

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TH 01-019-C-M/H

[Filed January 24, 2001]

THE OSLER INSTITUTE, INC.
Plaintiff

v.

LOIS FORDE,
Defendant.

COMPLAINT

Plaintiff, for its causes of action against Defendant, alleges and says:

JURISDICTIONAL FACTS

1. That Plaintiff is a domestic corporation engaged in the business of furthering medical education of physicians by developing seminars for physicians.

2. That its principal place of business is in Terre Haute, Indiana.

3. That the Defendant resides at 103 67th Avenue Northeast, Arlington, Washington 98223.

4. That there is complete diversity between the parties and the amount in controversy, exclusive of costs and interest, is in excess of $75,000.00.

5. That this Court has jurisdiction pursuant to 28USC Section 1331.

6. That at all times material hereto the Defendant was an employee and a member of the Board of Directors of The Osler Institute, Inc.

COUNT I - REQUEST FOR A PRELIMINARY AND PERMANENT INJUNCTION

7. That Plaintiff has developed various proprietary information based upon its extensive service to the medical community including, but not limited to:

   a. Developing a faculty
   b. Developing course contents
   e. Developing lists of attendees
   d. Developing lists of hotels
   e. Developing a staff to assist attendees with travel, lodging and the like

8. That amongst the courses offered by Plaintiff on a regular basis was and is a course in psychiatry.

9. That Defendant signed a non-compete agreement, a copy of which is attached hereto, marked Exhibit A, and incorporated by reference.

10. That said agreement sets forth certain obligations and duties owed by Defendant to Plaintiff.

11. That Defendant, as a member of the Board of Directors, took the minutes of the corporation and was paid fees and expenses for attending corporate meetings.

12. That Defendant owed to Plaintiff a duty of loyalty and a fiduciary duty.

13. That at all times material hereto Defendant participated in Board meetings and became intricately involved with the policies and procedures of the corporation.

14. That the Defendant further learned of the corporation's proprietary information and trade secrets by virtue of her being the corporate head on site of various seminars.

15. That while conducting a course in California during the year of 2000, Defendant engaged in defamatory attacks on another officer of the corporation making the baseless claim that its President engaged in unlawful and unethical conduct with a psychiatric patient who was serving as a study for the psychiatrists who were preparing to take their board

certification examinations, all to the economic detriment of the corporation.

16. That Plaintiff has learned that Defendant has become a renegade as to her duties owed to Plaintiff. She has combined with certain of Osler's faculty to form a group called Psyprep Courses, L.L.C. This group which includes Plaintiff has organized and advertised that it will put on a course in psychiatry in Chicago scheduled for April 26-28,.2001.

17. That unless enjoined by this Court the Plaintiff will suffer irreparable harm and the Plaintiff would have no adequate remedy at law.

18. That the business of Plaintiff is a niche business and Plaintiff operates throughout the United States, Washington D.C., and various territories.

19. That the Defendant has been advised by draft copy of the complaint by U.S. Express Mail on the 18th day of January, 2001.

WHEREFORE, the Plaintiff requests that this matter be advanced on the Court's calendar because an emergency exists and to set this matter for an expeditious hearing and after hearing to grant to the Plaintiff a preliminary injunction against the Defendant prohibiting her from planning further or participating in any way in this Chicago seminar offered by Psyprep Courses, L.L.C., from disclosing any more trade secrets or misusing proprietary information or competing with the Plaintiff corporation in any manner.

THE OSLER INSTITUTE, INC.

/s/_____
By: DR. JOSEPH SELLIKEN,
Its President

VERIFICATION

I affirm under the penalties for perjury that the foregoing representations are true.

/s/_____
DR. JOSEPH SELLIKEN, President
THE OSLER INSTITUTE

TRUEBLOOD LAW FIRM
626 South Sixth Street
P.O. Box 10068
Terre Haute, IN 47801
(812) 232-5071
(812) 232-8657 fax

/s/_____
STEPHEN L. TRUEBLOOD
#594-84, Attorney for
The Osler Institute, Inc.

COUNT II- BREACH OF CONTRACTUAL DUTIES

Plaintiff, by Counsel, for its second cause of action against Defendant, now re-alleges and reasserts each and every allegation set forth in rhetorical paragraph one through nineteen (1-19) of Count I hereof as if the same were set forth verbatim.

20. That the actions taken by Defendant in organizing, combining with Plaintiff's faculty members, arranging for the site of the upcoming Chicago psychiatry course, participating in the advertisement, taking the calls of prospective attendees and organizing this course with an eye towards personal profit are actions in derogation of the contract attached as Exhibit A as well as the other duties of loyalty and her fiduciary duties owed to Plaintiff corporation.

WHEREFORE, Plaintiff prays for judgment of and against Defendant in a sum sufficient to fully and fairly compensate it for each and every element of damage cognizable at law and for all other just and proper relief in the premises.

THE OSLER INSTITUTE, INC.

/s/_____
By: DR. JOSEPH SELLIKEN,
Its President

VERIFICATION

I affirm under the penalties for perjury that the foregoing representations are true.

/s/_____
DR. JOSEPH SELLIKEN, President
THE OSLER INSTITUTE, INC.

TRUEBLOOD LAW FIRM
626 South Sixth Street
P.O. Box 10068
Terre Haute, IN 47801
(812) 232-5071
(812) 232-8657 fax

/s/_____
STEPHEN L. TRUEBLOOD
#594-84, Attorney for
The Osier Institute, Inc.

COUNT III - BREACH OF FIDUCIARY DUTY AND DUTY OF LOYALTY

Plaintiff, by Counsel, for its third cause of action against Defendant, now re-alleges and reasserts each and every allegation set forth in rhetorical paragraph one through twenty (1-20) of Counts I and II hereof as if the same were set forth verbatim.

21. That in learning to conduct these seminars or courses Defendant availed herself of all of the knowledge of the corporation with regard to its activities, and with

respect to her serving as secretary for the corporation and in receiving fees and expenses to attend said corporate meetings the Defendant became intimately involved with the gamut of issues to come before the Board.

22. That in violation of her fiduciary duty to the corporation and her duty of loyalty to the corporation she has breached said duties causing damage to the corporation.

WHEREFORE, Plaintiff prays for judgment of and against Defendant in a sum sufficient to fully and fairly compensate it for each and every element of damage cognizable at law and for all other just and proper relief in the premises.

THE OSLER INSTITUTE, INC.

/s/_____
By: JOSEPH SELLIKEN,
Its President

VERIFICATION

I affirm under the penalties for perjury that the foregoing representations are true.

/s/_____
DR. JOSEPH SELLIKEN, President
THE OSLER INSTITUTE, INC.

TRUEBLOOD LAW FIRM
626 South Sixth Street
P.O. Box 10068
Terre Haute, IN 47801
(812) 232-5071
(812) 232-8657 fax

/s/_____
STEPHEN L. TRUEBLOOD
#594-84, Attorney for
The Osier Institute, Inc.

COUNT IV- INTENTIONAL INTERFERENCE WITH PRESENT AND PROSPECTIVE BUSINESS RELATIONSHIPS AND CONTRACTS

Plaintiff, by Counsel, for its fourth cause of action against Defendant, now re-alleges and reasserts each and every allegation set forth in rhetorical paragraph one through twenty-two (1-22) of Counts I, II and III hereof as if the same were set forth verbatim.

23. That over its years of business, Plaintiff has developed a loyal faculty, staff and set of attendees and has developed goodwill within the medical community it serves.

24. That Defendant, in abandoning her employer and the corporation she served as director, she necessarily made a determination to compete with and erode the goodwill that had been developed causing the corporation economic harm.

25. That when individuals wish to sign up for this renegade course in Chicago they are directed in the advertisement to call the Defendant's phone number.

26. That, as reflected by the records of the Plaintiff corporation, the Defendant has taken no steps to separate herself from the employ of Plaintiff other than to compete against it.

WHEREFORE, Plaintiff prays for judgment of and against Defendant in a sum sufficient to fully and fairly compensate it for each and every element of damage cognizable at law and for all other just and proper relief in the premises.

THE OSLER INSTITUTE, INC.

/s/_____
By: DR. JOSEPH SELLIKEN,
Its President

VERIFICATION

I affirm under the penalties for perjury that the foregoing representations are true.

/s/_____
DR. JOSEPH SELLIKEN, President
THE OSLER INSTITUTE

TRUEBLOOD LAW FIRM
626 South Sixth Street
P.O. Box 10068
Terre Haute, IN 47801
(812) 232-507I
(812) 232-8657 fax

/s/_____
STEPHEN L.TRUEBLOOD
#594-84, Attorney for
The Osler Institute, Inc.

COUNT V- SLANDER

Plaintiff, by Counsel, for its fifth cause of action against Defendant, now re-alleges and reasserts each and every allegation set forth in rhetorical paragraph one through twenty-six (1-26) of Counts I, II, III and IV hereof as if the same were set forth verbatim.

27. That the Plaintiff has learned through reliable hearsay that during Defendant's conduct of a course in California she made to faculty at the course certain false and baseless allegations against the President of the corporation.

28. That in these psychiatry courses offered to individuals who are about to take their board certification examinations, Plaintiff solicits the voluntary participation of individuals who have been diagnosed by other psychiatrists as having recognizable psychiatric disorders. That a part of the board

certification process for psychiatrists includes oral exams with such individuals.

29. That Defendant knowing full-well of the falsity of her statements made statements to the faculty to the effect that Osler's President had engaged in unethical and illicit congress with one of the patients, all with an eye of causing economic damage to the corporation.

WHEREFORE, Plaintiff prays for judgment of and against Defendant in a sum sufficient to fully and fairly compensate it for each and every element of damage cognizable at law and for all other just and proper relief in the premises.

THE OSLER INSTITUTE, INC.

/s/_____
By: DR. JOSEPH SELLIKEN,
Its President

VERIFICATION

I affirm under the penalties for perjury that the foregoing representations are true.

/s/_____
DR. JOSEPH SELLIKEN, President
THE OSLER INSTITUTE

TRUEBLOOD LAW FIRM
626 South Sixth Street
P.O. Box 10068
Terre Haute, IN 47801
(812) 232-507I
(812) 232-8657 fax

/s/_____
STEPHEN L.TRUEBLOOD
#594-84, Attorney for
The Osler Institute, Inc.

FOLD OUT EXHIBIT

Exhibit A
"Employment Agreement"

ISH A

EMPLOYMENT AGREEMENT

THIS AGREEMENT made 6-21, 1995 by and between Lois Forde hereinafter sometimes referred to as "Associate" and THE OSLER INSTITUTE, INC., an Indiana corporation, hereinafter sometimes referred to as the "Corporation," WITNESSETH:

Whereas, the Corporation is engaged in the business of conducting continuing medical education programs which are organized, marketed and conducted throughout the United States and has developed a national reputation in conducting such programs and has developed certain expertise in conducting such programs;

Now, therefore, in consideration of the Corporation employing or continuing to employ Associate, Associate hereby accepts the terms and conditions hereinafter set forth:

1. NONCOMPETITION: During the term of this agreement, and for a period of thirty-six (36) months from the date of termination of the employment under this agreement, the Associate will not, within the geographic limits of the United States, own, manage, operate, join, control, or be employed by any business which competes or plans to compete with any continuing education program produced or being planned by the Corporation at the time of such termination. Associate agrees that the nature of the Corporation's market makes the entire United States the only meaningful geographic limit; that a three year restriction is reasonable and necessary due to the length of the Corporation's program planning and development cycle; that Associate's skills may be used in many jobs with businesses which do not compete with the Corporation and that the combined geographic, time and activity restrictions do not significantly bind the Associate to work for the Corporation or limit the Associate's opportunity for other employment.

2. NONSOLICITATION OF CLIENTS: Associate agrees that clients of the Corporation include both students and faculty who have or will have enrolled or contracted to participate in any past or future program organized, sponsored or co-sponsored by the Corporation. Associate agrees that employment by the Corporation gives Associate special access to the clients of the Corporation and that not abusing this special access is both reasonable and necessary to protect the Corporation's business. During the term of this Agreement and for a period of three years immediately following the termination of employment with the Corporation, the Associate shall not in any competition with Corporation employ or retain or be employed or retained by any person who is employed or retained by the Corporation during the term of this agreement, nor contact, nor solicit any client of the Corporation, whom Associate or anyone employed or retained by the Corporation had contacted or solicited.

3. TRADE SECRETS AND CONFIDENTIAL INFORMATION: It is contemplated that Associate will work on the planning or production of the Corporation's continuing education programs and in the course of employment will develop for and/or acquire from the Corporation confidential information and/or trade secrets vital to the Corporation. All records, reports, contracts, contract proposals, correspondence, financial figures, computer programs, data structures, accreditation papers, joint sponsorship applications and agreements, home study materials, customer lists, applicant lists, faculty lists, faculty referral sources, faculty and course evaluations, resumes, policies, procedures, techniques, forms, books, manuals, applications, orders, research, marketing information and plans, and other information regarding or involving the aforementioned business are confidential information or trade secrets and shall remain the exclusive property of the Corporation. Associate agrees not to retain, copy, disclose either directly or indirectly, remove from the office of the Corporation, or use in any manner, any above listed item or trade secret either during the term of this agreement or at any time thereafter, except as required in the course of employment by the corporation, or except when expressly authorized in writing by the President of the Corporation to do so. No further notice or other efforts by the Corporation will be necessary to maintain the security of these items.

4. CORPORATION REMEDIES FOR BREACH: Associate acknowledges that breach of any of the above described covenants covering non-competition, non-solicitation, or trade secrets and confidential information would cause irreparable damage to the corporation and that such damage would be difficult and costly to quantify. Accordingly, Associate agrees that in the event of any breach by Associate of any covenant contained in Sections 1, 2, and 3 above, the Corporation, in addition to all other remedies made, without prior notice to Associate, may apply to any court of competent jurisdiction for an injunction restraining breach of said covenant(s). The Associate and the Corporation agree that, in the event of any breach of any covenant contained in Sections 1, 2, and 3 above, the actual damages to the Corporation would be difficult, if not impossible, to calculate. Therefore, the parties agree that in the event of any such breach by Associate being involved in any way in any program competing with any Osler Institute program, the liquidated damages will be the greater of: a) $10,000 (ten thousand dollars) per day of any competing program planned, or announced or produced; or b) the total revenue collected for any competing program for registration and any other fees or commissions from any and all parties regardless of the amount of such revenue received by the Associate; or c) the total amount spent to plan, announce and produce the competing program(s).

BEST AVAILABLE COPY

TORNEY'S FEES: In the event any action is nced by the Associate or the Corporation against r and related in any way to Associate's employ- y the Corporation, the prevailing party shall be rsed by the other party for the prevailing party's ible attorney fees incurred therein.

SOCIATE BENEFIT PLANS: The Associate e entitled to participate in any pension, profit- g, medical or dental, group term life insurance, ion, paid vacation, holiday, or any other bene- n which is presently existing or which may be shed for associates of similar classification. Such o participation shall be in accordance with the of the particular plans involved. Only full-time, r associates are entitled to any benefit. Part-time, rary, or probationary associates are entitled only se benefits expressly offered in each particular it plan. No associate shall become eligible for vacation until completing a full year of employ- . Paid vacation does not accrue but is earned only ch anniversary date of employment.

USINESS EXPENSE: The Corporation, in accor- e with the rules and regulations that it may issue, reimburse the Associate for business expenses erly incurred during the performance of duties.

NAIVER AND SURVIVAL: The failure of the poration to insist upon strict compliance by the ociate with one or more of the covenants and restric- s contained herein, on one or more occasions, shall be construed as waiver, nor shall such course of on deprive the Corporation of the right thereafter to uire strict compliance therewith.

SEVERABILITY: Invalidity or unenforceability of term or provision, or any clause or portion thereof his agreement shall in no way impair or affect the idity or enforceability of any other provision of this eement, which shall remain in full force and effect.

If the invalidity provision or any clause or portion of this agreement due to the unreasonableness of time or geographic area covered by said term or provision or clause or portion thereof, this agreement shall nevertheless be effective for such period of time and for such geographic area as may be determined to be reasonable by a court of appropriate jurisdiction.

10. APPLICABLE LAW: This agreement shall be governed in all respects by the laws of the State of Indiana.

11. ENTIRE AGREEMENT: This agreement embodies the entire understanding between the parties. Any and all prior correspondence, conversation, or memoranda are merged herein and replaced hereby and are without effect hereon. No change, alteration, or modification hereof may be made except in writing signed by both parties hereto.

12. NON-ASSIGNABILITY: This agreement is personal. The Associate shall not, without the consent of the Corporation, assign or transfer this agreement or any rights or obligations hereunder.

13. GROUNDS FOR SUMMARY DISMISSAL: The Osler Institute requires integrity in all of its associates. The Osler Institute maintains a drug-free and smoke-free environment. Associate may not smoke on Osler property or use illegal drugs at any time. Associate agrees to submit to drug testing. Examples of behavior which may result in summary dismissal include but are not limited to: Falsification of work record; inappropriate association with Osler's clients or contractors; violation of the Osler non-smoking policy; theft of Osler's intellectual or physical property or other assets; insubordination; failure to perform assigned tasks; or refusal to submit to drug testing. In all cases of dismissal, the Associate will have a right of appeal to a panel of three officers and supervisors of the Corporation.

WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first written ove and shall be effective as of 6-1, 1995. ASSOCIATE has received a copy of this agreement.

Lois Forde
ature of Associate

Lois Forde
e of Associate printed or typed

13103 6th Ave NE
et Address

Arlington WA 98223
City State ZIP

Laurie I.S. Swanson
ature of Witness

Laurie I.S. Swanson
e of witness printed or typed

Signature for Corporation

Name printed or typed

The Osler Institute, Inc.
1094 East Dawn Drive
Terre Haute, IN 47802-0218

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Updated March 30, 1995

(2)

No. 03-706

Supreme Court, U.S.
FILED
JAN 13 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE OSLER INSTITUTE, INC.,

Petitioner,

v.

LOIS FORDE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM M. OLAH
Counsel of Record
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QUESTION PRESENTED

Should the Supreme Court consider whether Osler received adequate notice and opportunity to respond prior to a district court's entry of summary judgment *sua sponte*?

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent submits this Corporate Disclosure Statement:

The Respondent, Lois Forde, is an individual who resides in the State of Washington and was employed by the petitioner, The Osler Institute, Inc., an Indiana corporation.

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STATUTE AND RULES

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I. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. The issue presented by Osler does not meet the standards of Rule 10, Rules of the Supreme Court of the United States.

The Respondent ("Forde") contends that the Seventh Circuit's decision turned on a fact-sensitive analysis of the proceedings in the district court and, as such, does not entail an issue for which there is conflict among the Circuit Courts, an important federal question, or represent a departure "from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court." As evident from Forde's position outlined in this brief, the decision turned on the interpretation of certain statements or actions by the parties and the district judge and whether such circumstances constituted adequate notice to the Petitioner ("Osler") that the district judge might consider granting summary judgment.

For this reason alone, the Petition for Writ of Certiorari should be denied.

B. The decision at the district court and affirmed by the Seventh U.S. Circuit Court of Appeals is consistent with the record in the case and applicable case law, and turns on fact-sensitive and appropriate considerations by the district judge.

Osler strains in its Petition to raise an issue worthy of this Court's consideration – a burden it cannot meet after even a cursory review of the record and the appellate court's thorough decision affirming the district court's entry of judgment. This case presents neither genuine

conflict in Circuit decisions nor an unjust application of law by a district judge with the consent of his appellate colleagues. Instead, this is a case in which a district judge repeatedly communicated his skepticism about the Osler's case, on both the law and the facts. The record discloses, and the Seventh Circuit amplified, that Osler had ample notice that its case was in trouble and that the court might not ever see a basis to conduct a trial.

The fact-sensitive nature of the decision should be evident in this truncated synopsis:

Shortly before trial was to proceed, U.S. District Judge Larry J. McKinney heard oral arguments on a series of pre-trial motions. The parties had filed contentions, pre-trial disclosure lists, and a 500-page joint stipulation of exhibits. The case had been fully briefed and was scheduled for a court trial.

In a final pre-trial conference, Judge McKinney emphasized his concerns about Osler's case and issues raised in Forde's brief he considered "troublesome," including some that "appear to be relatively dispositive on some issues that may or may not be presented at trial." Osler's counsel asked for more time to address the issues and, given that Forde's brief was long and only recently filed, the judge demurred by vacating the trial date and ordering the parties to return 16 days later for oral argument (this would be only two days after the original trial date and a time when, presumably, both parties were fully prepared to try the case on the merits). Judge McKinney ended the conference by advising the parties that following this oral argument on these issues he would "reset this case about 30 days later, **or not**, depending on what we decide." (emphasis added) Prior to the oral argument, both

parties filed supplemental briefs (Osler included an affidavit). Both sides were told to bring their clients to the oral argument. Following the conference, Judge McKinney issued an Order stating, "It is apparent that there are several issues that may be resolved before trial as a matter of law" and that, "It is clear that those issues must be resolved before the case is submitted to a jury."

The oral argument proceeded without protest by Osler. The court covered a number of issues raised in the trial brief. Osler's counsel never suggested that it intended to call particular witnesses to address those issues or informed the court that there was critical evidence as yet unpresented to the court. At the conclusion of this oral argument, Judge McKinney advised all counsel that, "I'll do my best to get back *to give you a ruling* on this without too much delay." [emphasis added]. Thirty days later, the court issued an entry that effectively disposed of all issues in the case favorably to Forde – in essence, the parties are agreed, a *sua sponte* summary judgment entry (although the district court did not characterize its ruling in that way).

Having consented to the series of events without protest, and participated fully in the on- and off-the-record discussions with the district judge about the case's status and readiness for trial, Osler now protests the entry of summary judgment without notice and urges this Court to devote resources to identifying a national standard of notice required prior to a district court's exercise of its otherwise legal discretion by entering summary judgment *sua sponte*.

That it has such power is beyond question. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Exercising that

power is, to borrow a phrase from Seventh Circuit jurisprudence, "hazardous," and is one that warrants "special caution." *Jones v. Union Pac.R.R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002) (cites omitted). *Jones'* holding, following *Celotex,* was that the court may indeed enter such a summary judgment entry "as long as the losing party is given notice and an opportunity to come forward with its evidence." *Id.* This procedure does not require a motion from an adverse party nor is there any holding that requires the district court to issue an explicit statement that it is considering making such an entry. Osler is left to complain only that the judge's overt skepticism about the viability of its case followed by a series of submissions and hearings was not a clear enough signal that it needed to examine seriously the evidentiary support for its claims. In fact, the district judge said, and the Seventh Circuit opinion emphasized, that the judge had betrayed his intentions by suggesting that it might not even be necessary to re-schedule the case for trial after he issued a ruling.

Meanwhile, despite the district judge's clear signals, Osler made:

- No inquiry about the purpose of oral argument scheduled or sought to clarify what would be discussed and for what purpose
- No objection to the vacation of its trial date
- No attempt to gather other evidentiary materials or make additional submission, save for a single affidavit, prior to or subsequent to oral argument
- No objection to the oral argument itself in a supplemental brief filed prior to the district court's ruling despite the judge's explicit coda

> at the conclusion of the argument promising "my best to give you a ruling on this without too much delay."

The appellate court opined that this procedural background, the statements of the court, and the actions (or inactions) of the parties and their counsel formed a sufficient basis for the district judge to dispose of the case by *sua sponte* summary judgment entry. In fact, the appellate court's decision specifically identified Osler's concession that it understood the judge might resolve *some* of the legal issues (but not necessarily all). There was every reason for Osler to comprehend that all of the issues were in play and all were "potentially dispositive," as Judge Evans noted in the appellate court opinion.

Significantly, Osler cannot argue that it was unrepresented or that the district court reached its decision based on no evidence or basis whatever. In fact, the district court already had before it a sizeable record, stipulated by the parties, and had examined counsel on a number of key issues in the case. Osler urges now that this Court establish a national standard in what are evidently relatively rare instances in which a *sua sponte* judgment is entered and where, as here, the record reveals a series of statements, behaviors, and decisions *prior* to a summary judgment ruling that cannot be credibly argued to have caught Osler or its counsel unaware.

C. The appellate court's opinion is consistent with the fact-sensitive analysis evident in a number of cases decided in the Seventh Circuit adjudicating *sua sponte* summary judgments.

Forde contests the suggestion that the Seventh Circuit has acted inconsistently with its own precedents in affirming the district court. In fact, the appellate court has undertaken a careful analysis of the factual or procedural circumstances in each case, as it did in this one. Osler's appeal is soliciting a reconsideration of the facts, not the application of a new legal analysis.

There is no basis to conclude that the procedural history conflicts with the *Celotex* decision as applied by the Seventh Circuit in *Simpson v. Merchants Recovery Bureau, Inc.*, 171 F.3d 546 (7th Cir. 1999) and its progeny, most notably, *Jones v. Union Pacific, supra*). In *Simpson*, the Seventh Circuit recognized that, as a general rule, "a district court lacks the power to grant summary judgment *sua sponte* unless the party against whom summary judgment was entered had (1) proper notice that the district court was considering entering summary judgment and (2) a fair opportunity to present evidence in opposition to the court's entry of summary judgment." *Simpson*, 171 F.3d at 540, citing *Celotex*, 477 U.S. at 326.

As noted previously, the record at the district court as reviewed by the Seventh Circuit demonstrates both requirements were met, i.e., Osler was on reasonable notice (if not explicitly raised by a motion written by its adversary or the court) that the district court was considering a dispositive handling of the case and Osler had a full opportunity by brief, argument, and supplemental submission to present its opposition to the court. This

standard was applied where no formal motion was pending in *Jones, supra*: "[T]he court may enter summary judgment *sua sponte,* as long as the losing party is given notice and an opportunity to come forward with its evidence." *Jones*, 302 F.3d at 740.

Likewise, the court upheld a *sua sponte* summary judgment in *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994):

> A district judge is authorized to grant summary judgment to a party that has not requested it (cite omitted). . . . he is not required to conduct a trial when there is no genuine issue of material fact, just because the parties lack the wit to notice the absence of any triable issues.

In *Goldstein v. Fidelity and Guaranty Insurance Underwriters, Inc.*, 86 F.3d 749, 751 (7th Cir. 1996), the Seventh Circuit again affirmed a district court's *sua sponte* summary judgment:

> We do not want to encourage district courts to consider summary judgment *sua sponte* because the procedure warrants 'special caution,' and it's often inappropriate. *See*, *Sawyer v. United States*, 831 F.2d 755 (7th Cir. 1987). It is also largely unnecessary, as the district court can always invite a nonmoving party to file a motion for summary judgment in its favor. But while we do not express resounding approval of *sua sponte* summary judgment, it is not always wrong for the district court to resolve certain cases in this fashion. It's just a bit risky. In this case, however, we conclude that Goldstein was afforded the necessary safeguards, and that the potential hazards of the procedure were avoided. No genuine issue of material fact existed, and disposition of

> the case hinged upon the Judge's interpretation of the insurance policy. We reject the claim that (the judge), in this case, was wrong to act *sua sponte*.

These cases are distinguishable from the facts in *Simpson*, *supra*, in which a party was not provided an opportunity to present evidence and the court relied on evidence filed contrary to the court's order. In *Simpson*, the district court's approach failed on both counts: the appellate court determined that the record did not support a view that the losing party could reasonably construe the proceedings to be one for a dispositive ruling and the district court had requested only limited input from the parties on certain legal actions. As such, the Seventh Circuit concluded the result was a "surprise" to the losing party. Moreover, the losing party's counsel objected at the hearing to the court's intention to grant summary judgment and requested specific opportunity to present additional evidence. The appellate court concluded this omission denied the losing party a meaningful opportunity to respond. Where there was no reasonable notice or opportunity to respond, the Seventh Circuit reversed the district court's decision.

As noted previously, Osler's counsel made no protest whatever during the relevant time period when it was clear the court was considering a dispositive handling of at least some, if not all, of issues outlined in the parties' trial briefs. Osler even submitted a supplemental brief *after* the July 24 hearing, leaving at least the inference that it had nothing more to present to the court with respect to those issues addressed in the trial briefs.

The Seventh Circuit also left undisturbed a district court's entry of summary judgment entered *sua sponte* and

without notice to the losing party in *Farries v. Stanadyne/Chicago Division*, 832 F.2d 374 (7th Cir. 1987), even though the trial judge failed to give notice of the trial judge's conversion of a Rule 12(b) motion into one for summary judgment. The court held:

> Our decision in *Milwaukee Typo* makes clear that a potentially disputed material issue of fact must exist to justify reversal of a trial court's decision to convert a motion to dismiss into a summary judgment where he fails to give the parties notice of his intention to convert the motion:
>
> > 'Where the record discloses the existence of unresolved material fact issues, or where the parties represent that they would have submitted specific controverted material factual issues to the trial court if they had been given the opportunity, we would have to find that summary judgment was inappropriate . . . *But where no potential disputed material issue of fact exists, a summary judgment will not be disturbed even though the district court disregarded the procedure which should have been followed.* . . . '.

832 F.2d at 377-78 (cites omitted).

By contrast, Osler cites *English v. Cowell*, 10 F.3d 434 (7th Cir. 1993) to support its view that the Seventh Circuit has been inconsistent in its consideration of such cases. Osler contends that the *English* proceedings afforded more notice than Osler received in this case. In *English*, however, the district court's decision was determined to be premature for the obvious reason that the judge's decision preceded the losing party's deadline to submit a brief. This offended the *Celotex* requirement that a losing party have

a reasonable opportunity to respond. Osler can make no such claim here.[1]

In *Aviles v. Cornell Forge Co.*, 183 F.3d 598 (7th Cir. 1999), the Court determined that raising an issue for the first time in a summary judgment reply brief denied a losing party a meaningful opportunity to respond. The losing party pursued one of its two available options by moving to strike that portion of the reply brief (the other choice was to petition for an opportunity to file a surreply brief). The court never ruled on the motion to strike and entered *sua sponte* summary judgment on the entire complaint anyway – a procedural history the Seventh Circuit concluded failed the "opportunity to respond" requirement of *Celotex*. It is important to emphasize, as Osler does not, that the losing party was resisting the entry of judgment, not acquiescing to the proceeding as did Osler in this case.

In all of these cases, the Seventh Circuit was engaged in scrutiny of the record to determine whether both *Celotex* strands had been satisfied: notice and opportunity to respond. As the parties here acknowledge, there is no

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[1] The Seventh Circuit opinion goes on to note that "remand is warranted because the harmless error doctrine does not save premature rulings when the loser did have something substantial to say in opposition." *English*, 10 F.3d at 438. Although Osler had opportunities to present arguments in the appellate proceedings that would support a view that the judge's decision would have been impacted by some evidentiary submission or legal argument it was denied the opportunity to present at the district court, it has cited none. This suggests that the losing party here had nothing more to say beyond its joint stipulation of exhibits and arguments advanced in the trial brief, oral argument, and supplemental brief.

specific guidance as to how or what such a notice should contain nor is there a specific outline of how the opportunity to respond may be exercised. What is clear, however, is that the Seventh Circuit has consistently applied the appropriate legal guidelines. Whether a particular set of facts or a district court record fits within those guidelines is a matter for the sound discretion of the appellate court. The issues of "unfair," "surprise," "reasonable opportunity to respond" that naturally are raised when a *sua sponte* summary judgment is challenged may be applied with consistency and yet result in different outcomes based on the underlying facts. Forde contends that Osler is dissatisfied with that application in the courts below here and has no basis for getting yet another review of this record by contending the Seventh Circuit has been inconsistent or that injustice meriting review under Rule 10 is evident. In fact, the record here supports the contrary conclusion.

II. CONCLUSION

If Osler was "unfairly surprised" by the district judge's decision, it had only itself to blame. Every indication short of a billboard notice or a mallet over the head had signaled the judge's skepticism and highlighted the weaknesses of Osler's case. Vacation of a trial date alone in such circumstances should sound alarms. The tenor of the argument that ensued and the submission of additional material certainly had all of the earmarks of a case that *might* never reach trial. In such circumstances, Osler is not entitled to plod along with the procedural steps in the confidence that, absent some "between the eyes" notice from the judge's pen, it could survive scrutiny of its trial brief and proceed with a trial.

Moreover, Osler was a full participant in the process of which it complains. It filed its briefs and supplemented them. It appeared at a hearing and made its arguments through counsel. It resisted Forde's explicit positions on fact and law in multiple ways. It consented to the submission of an evidentiary record. On this record, Osler clearly had an opportunity to respond.

Even if and when abuse occurs in that process, the Courts of Appeals are appropriate reviewers and arbiters of the processes in the courts below. It is a matter, like many, routinely conferred to the lower courts to uncover injustice and correct error – and in a highly fact-sensitive scenario such as this one and those like it, there hardly needs to be a standard enunciated by the Supreme Court of the United States greater than its guidance in *Celotex*.

For these reasons, the respondent, Lois Forde, respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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